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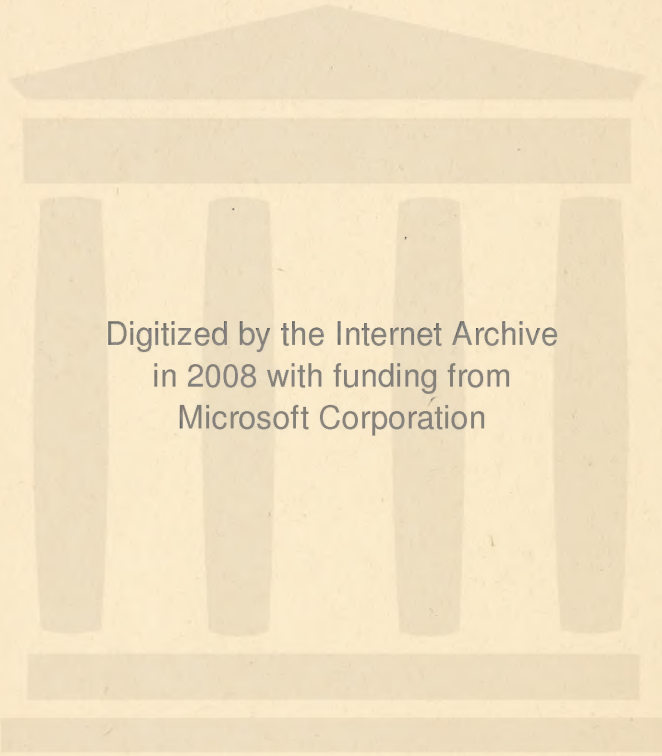


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ANNOTATED FORMS
OF
PLEADING AND PRACTICE
AT
COMMON LAW

AS MODIFIED BY STATUTES

For Use in All Common-Law States and Especially Adapted to the
States of Illinois, Michigan, Mississippi, Florida, Virginia,
West Virginia, Maryland and District of Columbia

BY

JOHN LEWSON

OF CHICAGO AND SPRINGFIELD BARS

Author of "Monopoly and Trade-Restraint Cases"

IN THREE VOLUMES

VOLUME I

CHICAGO

T. H. FLOOD & COMPANY

1914

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BY

JOHN LEWSON

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DEAR MR. FLOOD:

In this restless and constructive age when the true motives of men are so complex and so difficult of discernment and still more difficult of belief and trust, the dedication of a work to its publisher is full of danger and may tend to cut both the author and the publisher. But I, for one, dare to take the risk, and I shall leave it to you to assume the other. It might be asked, why a dedication, why dedicate the work to anyone. My answer is that established custom affords the opportunity of revealing the true inspirer and benefactor of a literary effort, and I propose that this opportunity shall not escape me.

For years, the general idea of this work was in your mind awaiting someone to carry it out. You stood ready and willing to sacrifice a large sum of money to make that idea bear fruit. I came, and you entrusted the work to me. The idea was yours; I was but the instrument.

Thus, the commencement, the conclusion, and all that this work attempts to be, is a direct result of your influence and substantial support. It therefore gives me great pleasure to most cordially dedicate this work to you; and may a noble and learned profession fully justify your efforts in its behalf.

JOHN LEWSON.

TO MR. LAURENCE J. FLOOD.

PREFACE

It has been correctly said that the remedy is the life of the right; and it may be as accurately stated that no remedy at law is possible without proper forms. The forms of an action are inseparable from the right itself. Therefore, it often occurs that a substantial right is either waived or it is completely lost, by an omission of certain formalities. It is through the forms of the law, that the entire range of pleading and practice becomes useful, and it was with the object to make pleadings and practice available that this work was undertaken and developed.

Common law forms will always be of value to the legal profession, as the main difference between common law and code pleading lies in the manner and not in the substance of pleading. Thus, a good common law pleader presents the different phases of a cause of action under distinct counts and includes a consolidated count to cover the entire action. A competent code pleader states the cause of action in a single count or complaint that is equivalent to the consolidated count of the common law pleader. The ultimate object of the two modes of pleading is necessarily the same, the modern tendency of common law pleading being toward the use of a consolidated count as against the old method of pleading a multiplicity of counts.

It will be observed that this work has three main features—the general principles of pleading and practice, the forms or precedents and the annotations.

Little need be said about the first division. A glance at the Contents of Volume I will afford a sufficient general idea of pleading and practice.

With reference to the precedents this much may be said here. Precedents are general, special or statutory. General precedents may be used literally. These are the common counts, general pleas or issues, general replications, etc. The statutory precedents should be used similarly. But special precedents are suggestive only. Great care must be exercised in their use. The

value of a special form is twofold: it shows what has been considered good form under certain circumstances; and it suggests the course to be pursued in the construction of a similar form. From these considerations it should not be difficult, in actual practice, to draw a form that would hold good in a case which involves similar but not identical facts. On account of the suggestive character of special forms they have been given substantially as they have occurred in actual cases. They could have been shortened; but this would have taken away much of their clearness and suggestive force, which no amount of explanation could replace. A form which is not understood is worse than no form at all. After a form is understood, it is comparatively easy to change it to conform to the particular case in hand.

In gathering material for annotations several definite objects were sought to be accomplished by them. It was not simply to annotate the form. To an effective use of the most important forms, one must possess a clear and comprehensive knowledge and appreciation of his right of action or defense. Therefore, one of the objects was to note precisely how far the courts have allowed or rejected causes of actions or defenses. Another object was to fully annotate every distinct part of the form. And still another object was to place the annotations in their natural and logical positions. Ordinarily, annotations follow the matter annotated. This has a tendency to greatly limit the scope of annotating and to place more prominence to the form than to the annotations. A better way, it was thought, was to treat the forms and the annotations as of equal importance and to classify according to the subject-matter rather than to place the annotations arbitrarily below or above the forms.

As some of the states have different ways of citing the same class of cases, it has been deemed advisable to follow the mode of citation that prevails in each state in preference to using a uniform citation for all of the states. Thus, no change has been made in the manner of citing *Lyle v. Cass* Circuit Judge, a Michigan case, although it would have appeared differently if it was harmonized with the citation of similar cases in Illinois. But to facilitate the looking up of cases brought by or against towns, villages and cities, this class of cases appears under the name of the town, village or city and not under "village of," etc. The searcher for a case of this kind has usually in mind the

name of the municipality and is not concerned by the fact that it is a village, a town or a city. Thus, if anyone desires a case brought by or against Meridian (city), Ft. Myers (town) or Ridgway (village) he is apt to turn to the names of these municipalities and not to their classes.

The arrangement and the classification of a work has become of some importance to the profession. Many a nice point of practice may easily be obscured under an impractical scheme of classification. Great care has therefore been given to the proper placing of the subject matter. General matter has been placed under general headings; matter which is of limited scope will be found under special heads. To take the subject of parties for illustration. It will be observed that this subject is susceptible of a general and special division. For this reason it is under more than one head. It will be found under parties generally, and also under the different forms of actions. The same is true of defenses. In its ordinary sense, the defense of a suit has special reference to the defendant alone. But under special circumstances, as where the defendant alleges new matter requiring the plaintiff's answer, the plaintiff becomes as much a defendant with reference to that matter as the defendant is in regard to the matter that is alleged by the plaintiff. Therefore, under "Defenses" will be found rules and principles which relate to both parties to the suit, depending upon the particular position they occupy during its progress. So, with appeal and error, points on this subject most naturally arise at the time the appeal is prayed and allowed, at the time the case is upon review regardless of the court reviewing it, and in the particular court of review. Hence, matters of appeal and error have been classified under appeal at the end of the specific action or proceeding where the points peculiarly relate to such action; again under Appeal and Error as a separate chapter; and further, under chapters on Appellate Court and Supreme Court. All general matter, such as commencements and conclusions are contained in the first volume. But when a form has a special commencement or conclusion, it has been given in the form itself.

A classification has a distinct and separate place in legal literature, and should not be confused with an index. Primarily, the classification serves the author to logically arrange the subject matter. After that has been accomplished, the practical value of the classification is secondary. The practitioner is not

vitally concerned about the classification; but this cannot be said of the index. To the practitioner, the index is the key to the book. With this object in view, the index of this work has been constructed; and it is hoped that it may prove all that could be desired.

J. L.

SPRINGFIELD, ILLINOIS.

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BOOK ONE

PART I

COMMENCEMENT OF ACTIONS

ANNOTATED FORMS OF PLEADING AND PRACTICE

CHAPTER I

THEORY OF THE CASE

§§

- 1 Generally
- 2 Wrong theory
- 3 Correct theory

§§

- 4 Pleading
- 5 Estoppel and discontinuance
- 6 Appeal and error

1 Generally

The scheme or plan of the legal ground or grounds upon which an action is prosecuted, or upon which an action is defended, constitutes the theory of the case or the theory of the defense. An action is about to be commenced, what is the nature and character of the liability? Is it contract, or is it tort? Does it arise from general liability, or does it rest upon some special relationship, such as master and servant, agency, or the like? What shall be the form of the action? Assuming that an action was begun, and a party has been called upon to defend it, what general or special course must he pursue? Should he attack the jurisdiction of the court? Should the defect in the process first receive his attention? Or, should he enter, at once, upon the merits of his defense? And if the latter, what was the theory upon which the plaintiff has proceeded, and is it the one he should not have adopted? All these, and many other questions, present themselves at the very threshold of a proceeding and require an accurate solution. It will thus be seen, that the theory or theories of an action or of a defense, is essential for the marshaling of the facts, for the preparation of the pleadings, for the presentation of causes or defenses, and for the trial and the disposition of all legal controversies. The theory of an action or of a defense is to a civil suit, what the motive is to the un-

raveling of a criminal prosecution. Therefore, this theory should be decided upon as soon as practicable. In so far as each party to the litigation is concerned, the theory of the action or of the defense should not be left for development upon the trial, nor upon appeal or error. It is true, that in some instances, the theory of an action, or of a defense, is simple and of little practical value. But it is also a fact, that there are many times when the determination of the proper theory of the action or of the defense proves to be of the utmost importance, and that it is likely to be overlooked, unless special attention be given to it at the proper time. For the ascertainment of a reliable theory of an action or of a defense, a party should be in possession of all of the provable facts necessary to support his position; not alone for the establishment of a *prima facie* case, but also for rebuttal. Upon the adoption of a certain theory of procedure, it should be adhered to from the inception of the action, or of its defense, to its final termination.

2 Wrong theory

The consequences that follow a misapprehended theory of an action is illustrated by the following cases: In the *Hayes case*,¹ a collector of garbage picked up an electric wire in an alley and was killed. His administrator brought an action against the city and a telephone company upon three theories of liability; first, negligence of the city; second, negligence of the telephone company; and third, liability of the telephone company for the city's negligence. No effort was apparently made to try the case upon the correct theory, which was the liability of the telephone company for the city's negligence. As a result, a jury found the city not guilty, which disposed the first theory. On appeal to the appellate court, that court found the telephone company not guilty, which disposed the second theory. And on further appeal the supreme court decided that the third theory could not be sustained on account of the previous findings. Thus, an otherwise meritorious cause of action was disposed of against the injured party. The *Thompson case*² proceeded on the theory that the defendant owed to the plaintiff the duty to ring a bell; whereas, the actionable duty was not to wantonly or wilfully injure the plaintiff. Apparently, in the

¹ *Hayes v. Chicago Tel. Co.*, 218 Ill. 414 (1905).

² *Thompson v. Cleveland, C., C. & St. L. Ry. Co.*, 226 Ill. 542 (1907).

*Skszypczak case*³ the omission in the declaration to include a count charging wilful negligence and to follow up the charge by proper testimony, caused the loss of a seven thousand dollars' judgment. In the *Hubbardston case*⁴ the plaintiff proceeded upon the theory of rescission when he should have sued for a breach of the contract. In the *Henning case*,⁵ a misconceived theory of the cause of action resulted in the mis-statement of the cause and in the making of improper parties defendant. The *Stoudt case*⁶ shows that a trial judge's erroneous theory of an action will effect all of his rulings, and accomplish a miscarriage of justice. The *Lemon case*⁷ was reversed because the trial court directed a verdict upon the wrong theory. In the *Ball case*,⁸ the plaintiff framed her declaration upon a single theory of liability. On the trial, the case was submitted upon a different theory, the plaintiff recovering a judgment of fifteen hundred dollars. The appellate court affirmed this judgment; but the supreme court reversed and remanded the cause principally on the ground that a theory was pursued which found no foundation in the pleadings. In the *East St. Louis case*⁹ the proceedings were based upon a paving ordinance requiring the payment for a local improvement to be made from special taxation of contiguous property. The petition for the assessment denominated the proceeding as a "Special assessment for a local improvement." The commissioner who was appointed to spread the assessment named the proceeding a "Special assessment by special taxation of contiguous property;" but in making up the roll and spreading the assessment, he acted as in proceedings to levy a special assessment and not a special tax. In the lower as well as in the supreme court, the case was presented and tried as a special assessment proceeding. The case was reversed and remanded on account of the conflicting theories that were thus pursued. In the *Thomas case*¹⁰ an appeal was uselessly prosecuted to the supreme court. The action was forcible detainer. The appellant pro-

³ *Belt Ry. Co. v. Skszypczak*, 225 Ill. 242, 245 (1907).

⁴ *Hubbardston Lumber Co. v. Bates*, 31 Mich. 158, 169 (1875).

⁵ *Henning v. Sampsell*, 236 Ill. 375, 381 (1908).

⁶ *Stoudt v. Shepherd*, 73 Mich. 588, 599 (1889).

⁷ *Lemon v. Macklem*, 157 Mich. 475 (1909).

⁸ *Ball v. Evening American Publishing Co.*, 237 Ill. 592, 608, 609 (1909).

⁹ *East St. Louis v. Illinois C. R. Co.*, 238 Ill. 296 (1909).

¹⁰ *Thomas v. Olenick*, 237 Ill. 167 (1908).

ceeded upon the theory that a freehold was involved in that action; whereas, the title to premises cannot be questioned in such an action. So, in the *Roberts case*,¹¹ which was an action of trespass *quare clausum fregit* to which a plea of *liberum tenementum* was pleaded, it was held that ordinarily an appeal may be taken directly to the supreme court, but that an appeal lies to the appellate court when the case is tried on the sole theory of a right to possession, and not of title. In *Wiard v. Semken*,¹² the simple failure to understand what constitutes the gist of the action of detinue caused considerable confusion in the pleadings and required two courts to pass upon them.

3 Correct theory

The ascertainment of rights, the determination of the relevancy of evidence, and the application of instructions to the evidence were made possible in the following cases by a clear understanding of the true theory upon which each party proceeded in the cause. In the *Chew case*,¹³ a railroad company entered into a contract with general contractors for the construction of its railroad. The general contractors procured a subcontractor to deliver to them certain ties for the construction of the road. For part of the ties, the subcontractor was paid; for the remainder, no payment was received by the subcontractor. Subsequently the railroad company consolidated with another company. The subcontractor brought an action of assumpsit against the latter company for the unpaid portion of the ties; in which action, he recovered judgment. In determining the liability of the defendant company, the supreme court, in substance said, that the theory upon which the plaintiff must have recovered and was entitled to recover was that the ties were delivered in pursuance of a contract for the construction of the railroad, that the defendant company, in taking over the railroad as a part of the consolidation, converted the ties not paid for to its own use, that it was benefited by the conversion, and that if there was a partial tortious taking, the plaintiff could waive the tort and could recover in *indebitatus* assumpsit. In the *Mee case*,¹⁴ the simple but sharp conflict

¹¹ Douglass Park Bldg. Ass'n. v. Roberts, 218 Ill. 454, 457 (1905).

¹² Wiard v. Semken, 2 App. D. C. 424 (1894).

¹³ Toledo, W. & W. Ry. Co. v. Chew, 67 Ill. 378, 382 (1873).

¹⁴ Chicago Union T. Co. v. Mee, 218 Ill. 9, 12 (1905).

in the evidence supporting the different theories of the parties involved the consideration of a number of questions, such as, the necessity of giving correct instructions, the burden and shifting of proof, the exercise of ordinary care, the preponderance of the evidence, and the ultimate question of liability. The action was case for an injury caused by a collision between a street car and a wagon. The plaintiff's theory was that the car ran into the wagon before it left the car tracks and while a part of the rear end of the wagon was still on the track. The defendant claimed that the plaintiff's wagon had left the track, and had gone a sufficient distance to justify the motorman to pass the wagon, but that after the plaintiff had driven his wagon off the track, he ran against a telephone or telegraph pole, and that he was either forced to and did back his wagon into the track, or that his horse voluntarily so backed the wagon and thereby struck the car. *Armstrong v. Wilcox*¹⁵ involved a clear understanding of the different theories upon which the evidence was introduced and an ascertainment of which of the theories found the better support in the proofs. In the *Kiesewetter case*,¹⁶ the plaintiff, in an action on a life insurance contract, attempted to prove the insanity of the insured to avoid the self-destruction clause contained in the contract. Objection was promptly made to the introduction of the evidence; whereupon it was ruled out. The ruling was approved of by the reviewing court upon the ground that the plaintiff's theory of her cause of action was wrong. So, in the *Hart case*¹⁷ complaint was made that the trial court permitted incompetent evidence; but the reviewing court overruled the objection by ascertaining the theory upon which the declaration proceeded and by reconciling the evidence with that theory. The *McNamara case*¹⁸ was an action of replevin. The plaintiff proceeded throughout the trial upon the theory that he was the owner of the entire property, to the exclusive possession of which he was entitled; whereas, the defendant claimed that he had an interest in the property with the plaintiff. In passing upon the instructions in the case, it was necessary to have in mind these contradictory claims. In the *Ball case*¹⁹ an instruction was considered

¹⁵ *Armstrong v. Wilcox*, 57 Fla. 30, 31 (1909).

¹⁶ *Kiesewetter v. Maccabees*, 227 Ill. 48, 52 (1907).

¹⁷ *Hart v. Wabash S. Ry. Co.*, 238 Ill. 336, 338, 339 (1909).

¹⁸ *McNamara v. Godair*, 161 Ill. 228, 233 (1896).

¹⁹ *Ball v. Evening American Publishing Co.*, *supra*.

erroneous because it permitted a recovery upon a different theory from that which was justified by the declaration. So, in the *Christy case*,²⁰ an instruction was offered, which, if it had been given as presented, would have misled the jury. The trial court modified the instruction, and gave it. This was urged as error, but the reviewing court approved of the modification on the ground that the various theories of liability that were presented by the declaration justified the trial court's action.

4 Pleading

A pleader is not confined to a single theory of liability or defense. He may frame his pleadings upon as many different views of liability or defense as appear to him to be necessary.²¹ But no antagonistic theories should be injected into a case, as they lead to uncertainty, confusion and error.²²

5 Estoppel and discontinuance

The adoption of a specific theory of an action or of a defense may operate as an estoppel against the party making the choice, or it may amount to a discontinuance of the cause against one or more of the defendants. Thus, in the *Siegel case*²³ there was a protracted and expensive trial of a condemnation suit upon an agreed theory on the proper elements of damages to be allowed. At the end of the trial, one of the parties attempted to repudiate this theory. On the ground of estoppel, the trial and the supreme courts refused to permit it to be done. So, in the *Trah case*²⁴ a party was estopped from asserting important rights by entering into a stipulation. The *Strohschein case*²⁵ was an action of assumpsit against co-partners for work and labor brought before a justice of the peace. Judgment was rendered by the justice against all of the defendants. On appeal by one of them, which was authorized by statute, a judgment was rendered against the one who appealed. This judgment was reversed, on further appeal, on the ground of discontinuance, because the only theory upon which the plaintiff could have recovered in that case was that of joint liability.

²⁰ *Christy v. Elliott*, 216 Ill. 31, 48 (1905).

²¹ *Christy v. Elliott*, *supra*.

²² *Illinois C. R. Co. v. Abrams*, 84 Miss. 456, 464 (1904); *Grubb v. Milan*, 249 Ill. 456, 462, 465 (1911).

²³ *Metropolitan W. S. E. R. Co. v. Siegel*, 161 Ill. 638, 646 (1896).

²⁴ *Grant Park v. Trah*, 218 Ill. 516, 520 (1905).

²⁵ *Strohschein v. Kranich*, 157 Mich. 335, 338 (1909).

6 Appeal and error

A party will not be permitted to try his case upon one theory and to present it for review upon another theory.²⁶

Upon review, the theory of the case should be determined from the pleadings, the evidence, and the instructions of both parties, and not from the argument of counsel.²⁷

²⁶ United States Wringer Co. v. Cooney, 214 Ill. 520, 524 (1905); Davis v. Illinois Collieries Co., 232 Ill. 284, 291 (1908).

²⁷ Chicago City Ry. Co. v. Shaw, 220 Ill. 532, 534 (1906).

CHAPTER II

CAUSES OF ACTIONS

IN GENERAL

§§

- 7 Terms defined
- 8 Abolishing forms of actions, effect
- 9 Common law and statutory actions, nature

EX CONTRACTU ACTIONS

- 10 Acceptance, signature
- 11 Maturity
- 12 Demand

EX DELICTO ACTIONS

- 13 Act of God
- 14 Continuous cause
- 15 Damages, permanent and temporary, test, measure of

SURVIVORSHIP

- 16 Statutory actions
- 17 Test

FORMS OF ACTIONS

§§

- 18 Enumeration of actions

ACTIONS

- 19 Dog license, statutory penalty
- 20 Drainage benefits, upper and lower districts
- 21 Farm crossings, notice and service
- 22 Goods in transit
- 23 Illegal contracts
- 24 Lights in subway
- 25 Municipality, bad faith and collusion, practice
- 26 Penalties, foreign
- 27 Surety
- 28 Taxes, voluntary payment
- 29 Telegraph poles, rental
- 30 Transportation, refusal

IN GENERAL

7 Terms defined

The terms "right of action" and "cause of action" are equivalent expressions. The term includes every fact that is necessary for the plaintiff to prove to entitle him to recover and every fact that the defendant has a right to traverse. A cause accrues when facts exist which authorize one party to maintain an action against another.¹ The particular mode by which a right is required to be enforced is called the form of an action.

8 Abolishing forms of actions, effect

The distinctive nature of actions are not affected by the abolition of the forms of action or the adoption of the new ones.²

¹ Walters v. Ottawa, 240 Ill. 259, 263 (1909).

² Stirling v. Garrittee, 18 Md. 468 (1862).

9 Common law and statutory actions, nature

A common law and a statutory liability are different and distinct causes of action, the allegations and proof which are necessary to make out a case under each being materially different.³

EX CONTRACTU ACTIONS

10 Acceptance, signature

A contract is binding upon a party without his signature thereto, if his assent to the contract is expressed by some overt act. But the mere mental intention to accept an offer, however deliberate that may seem, is insufficient as an acceptance.⁴

11 Maturity

The maturity of the indebtedness before the institution of a suit thereon is essential to the right of recovery in an ordinary common law action.⁵ No *ex contractu* action is maintainable before a demand is due.⁶

12 Demand

A demand before suit is necessary when the contract is to pay a collateral sum upon request, or when the contract is to deliver any onerous property on demand, without specifying the time or place of delivery. A demand is not necessary when the contract is founded upon a precedent debt or duty, as in case of a bond, single bill, or for money lent, or is for the payment of a collateral sum on a day certain, or otherwise than upon request, or when the debt or duty arises immediately upon the performance of the consideration.⁷ The making of a demand for the performance of a contract is a condition precedent to the institution of an action for a breach of it, unless the demand has been waived, or for some lawful reason has been dispensed with.⁸

³ Bradley v. Chicago-Virden Coal Co., 231 Ill. 622, 627-628 (1908).

⁴ Clark v. Potts, 255 Ill. 138, 188 (1912).

⁵ Stitzel v. Miller, 250 Ill. 72, 76 (1911).

⁶ Nickerson v. Babcock, 29 Ill. 497, 500 (1863).

⁷ Minor v. Michie, Walker 24, 29 (Miss. 1818).

⁸ Manning v. West, 6 Cush. 463, 465 (Mass. 1850).

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The insolvency of a debtor dispenses with the necessity for making a demand before instituting suit.⁹

EX DELICTO ACTIONS

13 Act of God

The natural causes which exclusively produce an injury or a loss and which could not have been prevented by human care, skill, and foresight constitute an act of God.

An act of God excuses an injury when it is the proximate and sole cause of the injury: an act of God does not excuse an injury which is the result of negligence and an act of God combining as an active co-operative cause of the injury.

This rule is applicable to telegraph companies for the reason that they are required to use a high degree of care and skill in the correct and prompt transmission of messages.¹⁰

14 Continuous cause

An injured party has a separate cause of action for each wrongful or negligent act; and he is not bound to assume that such an act will be continued.¹¹

15 Damages, permanent and temporary, test, measure of

For an injury that has been occasioned by a structure which is of a permanent character, there can be but one recovery, which must include all damages, present and prospective.¹²

A person is liable for all consequences which might have been foreseen and expected to result from his conduct, but not for those which he could not have foreseen and which he was therefore under no obligation to take into consideration.¹³

An injury is not permanent within the rule which limits but one recovery of all damages, past, present and prospective, where the continuance and operation of a permanent structure are not necessarily injurious, but may or may not become so.¹⁴

In an action for permanent injuries to real estate, the correct

⁹ Kelly v. Garrett, 1 Gilm. 649, 653 (1844).

¹⁰ Providence-Washington Ins. Co. v. Western Union Tel. Co., 247 Ill. 84, 89 (1910).

¹¹ Ramey v. Baltimore & Ohio S. W. R. Co., 235 Ill. 502, 506 (1908).

¹² Price v. Union Drainage District, 253 Ill. 114, 119 (1912).

¹³ Nall v. Taylor, 247 Ill. 580, 584 (1910).

¹⁴ Jones v. Sanitary District, 252 Ill. 591, 599 (1912).

measure of damages is the difference in the cash value of the land before the same was damaged and its fair cash value afterwards: in an action for temporary damages, the proper measure of damages is the actual loss sustained during the continuance of the injury.¹⁵

SURVIVORSHIP

16 Statutory actions

Statutory actions do not survive at common law.¹⁶

17 Test

A right of action will not survive if it is so entirely personal that the party in whom it exists cannot by contract place it beyond his control.¹⁷

FORMS OF ACTIONS

18 Enumeration of actions

The common law forms of *ex contractu* and *ex delicto* actions are in force in Illinois.¹⁸ The principal common law *ex contractu* actions are: Assumpsit; Debt; Covenant; Detinue; and the *ex delicto* actions are, Case (Personal Injuries); Trover; Replevin; Trespass, (*vi et armis* and trespass *quare calusum fregit*); Ejectment.

With slight exception, the following is a list of the statutory and other actions and proceedings now in use: Account; Administration; Adoption; Agreed and Compromised Case; Appeals—Intermediate; Application for Judgment and Order of Sale; Arbitration; Arrest for Debt and Release; Attachment; Attachment in Aid; Attachment of Water-craft; Boundary Lines; *Caveat*; Certiorari; City's Incorporation, Annexation and Disconnection of Territory; Civil Service; Condemnation; Confession of Judgment; Conservator or Committee; Contempt; Dependent Children; Disbarment; Distress for Rent; Drainage Organization, Assessment, Dissolution and Taxation; Elections,

¹⁵ Jones v. Sanitary District, 252 Ill. 601; Price v. Union Drainage District, 253 Ill. 119.

¹⁶ and ¹⁷ Selden v. Illinois Trust & Savings Bank, 239 Ill. 67, 77-78 (1909).

¹⁸ Raiser v. Chicago & Alton Ry. Co., 215 Ill. 47, 56 (1905); Sec. 1, c. 62, Rev. Stat. 1845 (1911 Hurd's Stat., p. 519).

Contest; Forcible Detainer; Guardianship; Garnishment; *Habeas Corpus*; Inheritance Tax; Liens' Release; Lost Records; Lunacy; *Mandamus*; Motion for Judgment; *Ne Exeat*; Prohibition; *Quo Warranto*; Roads and Bridges; Schools; *Scire Facias*; Special Assessments; Special Taxation; Taxation; Township Organization and Taxation; and Villages.

ACTIONS

19 Dog license, statutory penalty

An ordinance which requires a dog license and which imposes a penalty for the failure to secure it, is valid and enforceable as a police regulation, whether the license is designated in the ordinance as a license, a tax or a fee, and regardless of any disposition that is to be made of the license fund.¹⁹

20 Drainage benefits, upper and lower districts

The Act of 1903 which authorizes a recovery by a lower district for benefits derived by an upper district, constitutes class legislation and is invalid, because it fails to confer a similar right upon the upper district.²⁰

21 Farm crossings, notice and service

To the railway company:

Notice is hereby given to you that the undersigned,, is the owner of the following described real estate: beginning (Insert legal description).

Notice is further given you that a farm crossing has become necessary to be constructed across the right of way of the railway company, so that the undersigned, may cross the same to get the benefit of the railway company; that the railway company is a traction company operating cars over said road by electric motive power; that the line runs from the city of Illinois, to the city of , in the state of Illinois; that it is necessary for

¹⁹ Paxton v. Fitzsimmons, 253 Ill. 355, 357-60 (1912); Cl. 80, sec. 1, art. 5, Cities and Villages act (1911 Hurd's Stat., p. 267); Secs. 1 and 10, art. 9, Constitution 1870.

²⁰ Bay Island Drainage District v. Union Drainage District, 255 Ill.

194, 200-201 (1912); Act May 14, 1903 (1911 Hurd's Stat., p. 927); Drainage Commissioners v. Union Drainage District, 211 Ill. 328 (1904), overruled; People v. Crews, 245 Ill. 318 (1910), overruled.

the undersigned to frequently go to and to the city of; that the cars run each way from o'clock in the morning until o'clock in the evening; that the undersigned's dwelling house is on his said farm, as above described, and north of the line of said railroad, the railway company; that the track is between the dwelling house on the undersigned's farm and the said traction line, and that the undersigned has no way of getting across the said railroad to the said traction company's line so as to board the cars and take advantage of the same; that it has become necessary and is necessary for the use of the undersigned, who is the proprietor of said farm above described, so adjoining the right of way, as aforesaid, that a crossing for said farm be put in by the said railroad company, so that the undersigned, as proprietor, may cross over to the interurban and board the cars of said interurban company; that the undersigned suffers great inconvenience and damage in the operation of his farm by being cut off from the use of said mode of travel, which is, in certain seasons of the year, the only mode of travel for the undersigned to the county seat and to the markets of the county from his said farm; that he either has to be cut off from egress and ingress to and from this mode of travel, aforesaid, by the traction company, or become a trespasser on the right of way of the said railroad company;

Therefore, notice is given to you that a farm crossing has become necessary to be constructed across the right of way of the railway company for the use of the undersigned, the said, who is the owner and proprietor of said lands above described adjoining such railroad on the north.

Notice is further given that if you shall refuse to build the said farm crossing across your right of way in accordance with the provisions of the statute in that case made and provided, that the undersigned, who is the owner, occupant and proprietor of said land above described, will build said farm crossing across the right of way, if you refuse or neglect to build the same within thirty days, and will thereafter bring suit against you so refusing or neglecting to build said farm crossing, to recover double the value thereof, with interest at one per cent per month as damages from the time such farm crossing shall be built,

together with costs, as provided by the statute in such cases made and provided.

Witness the signature of, the owner of said land, this day of, 19..

(Venue)

., being first duly sworn on oath, states that he is one of the deputies to the sheriff of the county of afore-said, and that he did on the day of, 19...., serve a copy of the attached notice on the railway company by delivering a true and correct copy of the same to, station agent of the said railway company.
, Deputy Sheriff.

Subscribed, etc.²¹

22 Goods in transit

The consignor, the consignee, and the real owner of goods in transit have each a special interest in the goods transported, giving each an *ex contractu* or an *ex delicto* right of action against the common carrier for breach of duty as carrier or warehouseman.²²

The common carrier and the wharfinger are bound to obey the directions of the consignor of goods with respect to their destination or delivery, and they are liable for loss that occurs from a failure to obey these directions.²³

23 Illegal contracts

A contract entered into in violation of an express statutory prohibition cannot be made the basis of an action in contract or tort.²⁴

24 Lights in subway

A railroad company cannot be required by ordinance, under the general police power of a municipality, to maintain lights in a subway created by the elevation of its tracks.²⁵

²¹ *Shea v. Cleveland, C., C. & St. L. Ry. Co.*, 250 Ill. 97, 101 (1911).

²² *Edgerton v. Chicago, R. I. & P. Ry. Co.*, 240 Ill. 311, 315, 317 (1909).

²³ *Lewis v. Galena & C. U. R. Co.*, 40 Ill. 281, 289, 290 (1866); *Howell*

v. Morlan, 78 Ill. 162, 166 (1875).

²⁴ *Ellison v. Adams Express Co.*, 245 Ill. 410, 418 (1910).

²⁵ *Chicago v. Pennsylvania Co.*, 252 Ill. 185, 192 (1911); *Sec. 1997 Municipal Code, Chicago.*

25 Municipality, bad faith and collusion, practice

The proper practice for a tax-payer to present the question of bad faith and collusion in the abandonment of a case by or against a municipality, is to apply to the trial court for leave to intervene and to be heard; and if this be denied, and it be desired to have the judgment reviewed by the appellate court, to preserve his rights by proper exceptions, and then to appeal or to sue out a writ of error from the appellate or the supreme court.²⁶

26 Penalties, foreign

The penal laws of other states are unenforceable beyond the state of their enactment.²⁷

27 Surety

In the absence of statute, a surety has the right to require of his creditor only that no affirmative act shall be done that would operate to his prejudice.²⁸

28 Taxes, voluntary payment

Money voluntarily paid for taxes are not recoverable on the ground that the act under which the tax was collected is unconstitutional.²⁹

29 Telegraph poles, rental

A municipality has authority to require of telegraph companies a reasonable compensation for the exclusive use of streets and alleys for the erection and maintenance of poles. This does not conflict with the acts of Congress; and the compensation is not a license nor a tax, but it is a charge in the nature of a rental.³⁰

²⁶ *People v. Lower*, 254 Ill. 306, 309 (1912).

²⁷ *Raisor v. Chicago & Alton Ry. Co.*, 215 Ill. 51.

²⁸ *People v. Whittemore*, 253 Ill. 378, 382 (1912).

²⁹ *People v. Whittemore*, 253 Ill. 385.

³⁰ *Springfield v. Postal Tel. C. Co.*, 253 Ill. 346, 353, 354 (1912); Post Roads act of Congress of 1866, amended in 1884; Sec. 4, c. 134 R. S. (1911 Hurd's Stat., p. 2309).

30 Transportation, refusal

An action on the case is maintainable against the common carrier for a failure to carry goods that have been received.³¹ But, the refusal and neglect of a railroad company to furnish, start or run cars for the transportation of goods offered to it, does not give the owner of the goods a right of action for treble damages under sections 22 and 23 of the Fencing and Operating Railroad act of 1874.³²

³¹ Phelps v. Illinois C. R. Co., 94 Ill. 548, 357 (1880). Ry. Co. v. People, 227 Ill. 270 (1907).

³² Atchinson, Topeka & Santa Fe

CHAPTER III

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IN GENERAL

31 The doctrine

A party who, by law or contract, may enforce his rights through different remedies, must choose between them. Upon making the choice, he is bound by it; as an election of one of the remedies, is a waiver of the others.¹

32 Application

The rule that a plaintiff is bound by his election has no application where he has no choice of remedies; ² nor where the action is misconceived or mistaken.³

¹ *Platt v. Aetna Ins. Co.*, 153 Ill. 113, 120 (1894); *Christy v. Farlin*, 49 Mich. 319, 320 (1882).

² *Carbary v. Detroit United Ry.*, 157 Mich. 683, 685 (1909); *Glover v. Radford*, 120 Mich. 542, 544 (1899).

³ *McLaughlin v. Austin*, 104 Mich. 489, 491 (1895); *Chaddock v. Tabor*, 115 Mich. 27, 33 (1897); *Bryant v. Kenyon*, 123 Mich. 151, 155 (1900); *Chicago Terminal Transfer R. Co. v. Winslow*, 216 Ill. 166, 172 (1905).

33 Effect

The election of a remedy is considered as of the date the action is commenced, irrespective of subsequent dismissal of the suit.⁴

34 Abandonment and discontinuance

The discontinuance or the abandonment of an independent and collateral remedy, before judgment, is no bar to the commencement of a new like remedy, if the discontinued and the new remedy are not inconsistent or irreconcilable.⁵

Replevin and trespass are not opposite and irreconcilable claims of right.⁶

APPLICATION TO SPECIFIC INSTANCES

35 Arrest for debt

Upon the satisfaction of a joint judgment, a joint debtor under arrest for debt may either move for the recall of the execution and for his discharge, or he may obtain his release upon *habeas corpus*.⁷

36 Bail bond

For a failure to put in special bail under a bail bond, the parties for whose benefit the bond was executed may proceed against the officer to whom it was given, or they may take an assignment of it and bring an action against the sureties.⁸

37 Obligations, joint and several

On a joint and several obligation, a party is at liberty to proceed against the obligors jointly, or severally; but once the election has been made, the action will be governed by the rules that are applicable to the particular kind of action that was commenced. That is to say, if the action is joint, the rule of recovery should be as in an action upon a joint contract alone.⁹

⁴ Thomas v. Watt, 104 Mich. 201, 205 (1895).

⁵ and ⁶ Stier v. Harms, 154 Ill. 474, 479, 481 (1895).

⁷ Eisen v. Zimmer, 254 Ill. 43, 48 (1912); Sec. 22, c. 65, Rev. Stat. (Ill.).

⁸ Wilcox v. Ismon, 34 Mich. 268, 272 (1876).

⁹ Gould v. Sternburg, 69 Ill. 531, 532 (1873).

38 Sales, refusal to accept goods; re-sale

Upon the vendee's refusal to accept goods purchased, the vendor has three remedies: first, to store the goods for the vendee, to give him notice thereof, and to recover the full contract price; second, to keep the goods and to recover the excess of the contract price over and above the market price of the goods at the time and place of the delivery; and third, to re-sell the goods at a fair price or to the best advantage, and to recover from the vendee the loss if the goods fail to bring the contract price.¹⁰

In the latter case, it is not necessary that the re-sale shall be at the original place of the delivery, but it may be made wherever the best possible price can be obtained for the goods, notwithstanding the existence of a contract specifying the place of delivery and it is for goods to be produced or manufactured.¹¹

39 Taxes, personal representatives

The people may enforce the payment of taxes due from a personal representative in the probate or county court, or by an action of debt.¹²

40 Tax titles

The owner of unoccupied premises which are claimed under an invalid tax title may either file a bill in chancery to remove the cloud, or he may bring ejectment.¹³

41 Wrongful attachment

A defendant in attachment, who has been wrongfully sued, may defend the attachment, he may sue on the attachment bond,¹⁴ or he may bring an action for malicious prosecution.¹⁵

APPLICATION TO PERSONS

42 Heirs, or devisees

Under Illinois statute, a creditor may sue a personal representative and the heirs jointly, or he may sue the personal

¹⁰ Bagley v. Findlay, 82 Ill. 524, 525 (1876); Ames v. Moir, 130 Ill. 582, 591 (1889); Osgood v. Skinner, 211 Ill. 229, 240 (1904).

¹¹ White Walnut Coal Co. v. Crescent Coal & Mining Co., 254 Ill. 368, 374-377 (1912).

¹² People v. Hibernian Banking Ass'n., 245 Ill. 522, 529 (1910).

¹³ Phillips v. Glos, 255 Ill. 58, 60 (1912); Sec. 7, Ejectment act (Ill.).

¹⁴ Thomas v. Hinsdale, 78 Ill. 259, 260 (1875).

¹⁵ Spaid v. Barrett, 57 Ill. 289, 293 (1870).

representative and the devisees jointly, or he may sue the personal representative, the heirs and the devisees jointly. In each case the personal representative must be joined in the action, unless judgment has been previously obtained against the personal representative and there are no assets in his hands for its payment, or the estate is not administered within one year from the death of the testator or intestate.¹⁶

43 Joint wrongdoers

A person who is injured by the joint wrong of several persons may sue all in one action, or he may sue each in a separate action and recover several judgments, of which he can have but one satisfaction.¹⁷

All who contribute to a tort either by will or act, even though in an inferior degree, are liable severally for the entire damages to the person injured, whether they are personally present or absent at the time of the injury.¹⁸

44 Sheriff and constables

Damages which result from the failure of a sheriff or a constable to take a sufficient return bond in replevin may be recovered in an action on the case, or in an action of debt upon the official bond.¹⁹

APPLICATION TO ACTIONS

45 Appeal or certiorari

If a court proceeds irregularly, the remedy is by appeal, and not by *certiorari*.²⁰

46 Assumpsit or trespass

At common law, the owner of land which is occupied by a trespasser, and the owner of personal property which is wrongfully taken and which has not been sold, cannot waive the trespass and sue in assumpsit. But, after the personal property

¹⁶ *Ryan v. Jones*, 15 Ill. 1, 4 (1853); Secs. 11, 14 and 15, c. 59, Revised Statute (Ill.).

¹⁷ *Severin v. Eddy*, 52 Ill. 189, 191 (1869).

¹⁸ *Kankakee & Seneca R. Co. v. Horan*, 131 Ill. 288, 300 (1890).

¹⁹ *People v. Core*, 85 Ill. 248 (1877); Sec. 12, c. 119, 1909 Hurd's Stat., p. 1820.

²⁰ *Schlink v. Maxton*, 153 Ill. 447, 454 (1894).

has been converted into money the owner of the property may waive the trespass and sue in *assumpsit*.²¹

Under Michigan statute, a trespass on land may be waived and *assumpsit* may be brought for the damages sustained by the trespass.²² If *assumpsit* is brought, the action must proceed as for a trespass under the statute and not upon contract.

47 *Assumpsit, replevin or trover*

A party who elects to sue in *assumpsit* cannot afterwards sue in *replevin* or *trover* for the same subject matter.²³

48 *Case or trespass*

The Illinois statute merely abolishes the technical distinction between the two forms of action of case and trespass; it does not affect or change the substantial common law rights and liabilities of the parties.²⁴

49 *Debt and covenant*

Debt and covenant are concurrent remedies for the recovery of demands arising from contracts under seal.²⁵

50 *Interpleader or replevin*

The owner of personal property upon which an attachment against another person has been levied, may either *replevin* the property or he may claim it by *interpleader* in the attachment proceedings.²⁶

51 *Replevin or trespass*

Property upon which a wrongful distress warrant has been levied may be either *replevined*, or the owner of the property may recover damages for its value in an action of trespass.²⁷

²¹ *Lockwood v. Thunder Bay River Boom Co.*, 42 Mich. 536, 539 et seq. (1880); *Watson v. Stever*, 25 Mich. 386, 387 (1872); *May v. Disconto Gesellschaft*, 211 Ill. 310, 315 (1904); *Toledo, W. & W. Ry. Co. v. Chew*, 67 Ill. 378, 383 (1873); *Ward v. Bull*, 1 Fla. 271, 278, 280 (1847).

²² *Lockwood v. Thunder Bay River Boom Co.*, *supra*; Sec. (11207), C. L. 1897 (Mich.).

²³ *Cooper v. Smith*, 109 Mich. 458, 460 (1896); *Thomas v. Watt*, *supra*.

²⁴ *Blalock v. Randall*, 76 Ill. 224, 228, 229 (1875).

²⁵ *Stewart v. Sprague*, 71 Mich. 50, 59 (1888).

²⁶ *Juilliard & Co. v. May*, 130 Ill. 87 (1889).

²⁷ *Stier v. Harms*, *supra*.

52 Replevin or trover

Trover and not replevin should be brought where the property sought to be recovered is incapable of identification.²⁸

53 Special assessments.

The failure to bring injunction, to commence *mandamus*, or to file objections to the application for judgment and sale to enforce payment of a special assessment will not preclude a party from bringing a personal action against the members of the board of local improvements for the recovery of special damages arising from the construction of a local improvement under a conspiracy between them and the contractor.²⁹

²⁸ German National Bank v. Meadowcroft, 95 Ill. 124, 129 (1880). ²⁹ Gage v. Springer, 211 Ill. 200, 208 (1904).

CHAPTER IV

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PRINCIPLES

54 Controlling elements

The limitation of an action is controlled by the law of the forum, by the cause of the action, by the person, corporation or municipality who sues or who is being sued, and by the form of the action.

55 Form of action

In states where the common law forms of action prevail, and in absence of statutory provision to the contrary, the form of the action, and not the cause of action, determines the bar of the statute.¹

Some of the provisions of the Michigan statute limit the action according to its form; other provisions, bar the action regardless of the form of action chosen.²

56 Cause of action, accrual

A cause of action accrues when facts exist which authorize one party to maintain an action against another regardless of the residence of either party,³ unless the statute expressly postpones

¹ *Bates v. Bates Machine Co.*, 230 Ill. 619, 622 (1907); *Christy v. Farlin*, 49 Mich. 319 (1882).

² *Christy v. Farlin*, *supra*; *Avery v. Miller*, 81 Mich. 85, 88 (1895); (9728), C. L. 1897 (Mich.); *Snyder*

v. Hitchcock, 94 Mich. 313, 315 (1892); (9751), C. L. 1897 (Mich.).

³ *Davis v. Munie*, 235 Ill. 620, 622 (1908).

its operation on account of the absence from the state of one of the parties.

57 Cause of action, fraudulent concealment

In Illinois, the fraudulent concealment of the cause of action entitles the party upon whom the fraud has been practiced to sue within five years from the discovery of his rights or of the perpetration of the fraud. To entitle a party to bring an action within five years from the discovery of a fraudulent concealment of a cause of action, something of an affirmative character designed to prevent, and which does prevent, a discovery of the cause of action must exist, where the original basis of the action is not fraud. Mere silence of a person who is liable to an action is insufficient under the statute.⁴

58 Commencement of running of statute

The statute of limitation begins to run from the time of the injury or from the time of the accrual of the cause of action.⁵

59 Commencement of suit, generally

The bringing of a suit terminates the running of the statute of limitations, regardless of when a recovery of judgment is had.⁶

60 Commencement of suit, summons and declaration

The issuance of the first summons, or other process, to bring the defendant into court, is the commencement of a suit for the purpose of arresting the running of the statute of limitations, if the first declaration filed states a good cause of action, although defectively. If the declaration states no cause of action and an amended sufficient declaration is filed, or if a new count is filed which brings forward a new cause of action, the date of the filing of the second declaration or new count is the commencement of the suit for the purpose of preventing the running of the statute.⁷

⁴ *Fortune v. English*, 226 Ill. 262, 267 (1907); Sec. 22, c. 83, Hurd's Stat. 1909, p. 1447.

⁵ *Jones v. Sanitary District*, 252 Ill. 598.

⁶ *Converse v. Dunn*, 166 Ill. 25, 29 (1897).

⁷ *Eylenfeldt v. Illinois Steel Co.*,

165 Ill. 185, 190 (1897); *Milwaukee M. Ins. Co. v. Schallman*, 188 Ill. 213, 220 (1900); *Fish v. Farwell*, 160 Ill. 236, 247 (1896); *Schroeder v. Merchants & M. Ins. Co.*, 104 Ill. 71, 79 (1882); *Chicago & Northwestern Ry. Co. v. Jenkins*, 103 Ill. 588, 594 (1882).

In actions commenced by declaration, the suit is not begun, within the meaning of the Michigan statute of limitations, until there is personal service upon the defendant of a copy of the declaration and rule to plead.⁸

61 Commencement of suit, what not

The substitution of an assignee or trustee in bankruptcy as plaintiff, without changing the cause of action that is then pending, is not the bringing of a new suit.⁹

PARTIES

62 Aliens

The statute of limitations in personal actions does not run against nonresident aliens, nor against subjects or citizens of a country which is at war with the United States.¹⁰

63 Minors and adults

A joint action in favor of an adult and a minor is not barred until two years after the minor has attained his majority.¹¹

64 Nonresidents, persons claiming under

In personal actions, the statute of limitations begins to run against a resident immediately after he acquires title to a cause of action from a nonresident, by death or otherwise.¹²

65 Sheriffs

Actions against sheriffs for misconduct or negligence of their deputies must be commenced within three years of the accrual of the cause of action.¹³

66 Sureties

The bar of a cause of action against the principal and one surety does not discharge or release another surety.¹⁴

⁸ *Detroit Free Press Co. v. Bagg*, 78 Mich. 650, 654 (1889).

⁹ *Chicago & Northwestern Ry. Co. v. Jenkins*, 103 Ill. 594, 598.

¹⁰ (9735), C. L. 1897 (Mich.).

¹¹ *Beresh v. Knights of Honor*, 255 Ill. 122, 124 (1912); Sec. 21, c. 83, Limitation act (Ill.).

¹² *Wolf v. District Grand Lodge*, 102 Mich. 23, 28 (1894).

¹³ (9730), C. L. 1897 (Mich.).

¹⁴ *People v. Whittemore*, 253 Ill. 378, 385 (1912).

67 Trustees in bankruptcy

Suits by or against trustees in bankruptcy cannot be brought after two years of the closing of the estate.¹⁵ Writs of error are suits within the foregoing rule.¹⁶

68 State and municipalities

Statutes of limitations do not run against the state or minor municipalities created by the state as local governmental agencies, such as counties, cities and towns, in respect to public rights, unless the state or the municipality, is included within the terms of the statute. This rule does not extend to a state or a municipality which acts in a matter involving private rights.¹⁷

The statute of limitations does not run against the state so long as it holds title for the use of the public.¹⁸ An action of debt by the people to enforce payment of taxes is not subject to the statute of limitations.¹⁹ Suits for the recovery of lands on behalf of the state may be commenced within twenty years after the cause of action has accrued.²⁰

A municipality is considered to act in its private capacity when it seeks to enforce rights in which the public in general have no interest in common with the people of the municipality. Thus, the trustees of schools act in a private capacity with respect to property held by them for the use of a particular school district.²¹ So, a municipality's right of action for damages done to a bridge is based upon private and not public rights.²²

69 Dissolved corporations

A corporation, in Illinois, may sue within two years after dissolution; it may be sued at any time during the general statute of limitations.²³

¹⁵ 2 Suppl. U. S. Rev. Stat., p. 849, sec. 11, cl. (d).

¹⁶ *International Bank v. Jenkins*, 107 Ill. 291 (1883).

¹⁷ *Brown v. School Trustees*, 224 Ill. 184, 187 (1906); *People v. Rock Island*, 215 Ill. 488, 493 (1905); *Whittemore v. People*, 227 Ill. 453, 474 (1907); *Chicago v. Dunham Towing & Wrecking Co.*, 246 Ill. 29, 30 (1910).

¹⁸ *Black v. Chicago, B. & Q. R. Co.*, 237 Ill. 500 (1909).

¹⁹ *People v. Hibernian Banking Ass'n.*, 245 Ill. 522, 529.

²⁰ (9724), C. L. 1897 (Mich.).

²¹ *Brown v. School Trustees*, *supra*.

²² *Chicago v. Dunham Towing & Wrecking Co.*, 246 Ill. 31.

²³ *Singer & Talcott Stone Co. v. Hutchinson*, 176 Ill. 48, 51, 52 (1898); Secs. 10-12, c. 32, Rev. Stat. (Ill.).

SPECIFIC CAUSES

70 Abduction

An action for abduction must be commenced within two years next after the accruing of the action.²⁴

71 Assault and battery

Actions for assault and battery are barred within two years from the time the action had accrued.²⁵

72 Animals at large

An action on the case for damages caused by permitting diseased sheep or domestic animals to run at large is barred within five years.²⁶

73 Bonds, administrator's

The statute of limitations begins to run against distributees of an estate upon an administrator's bond from the date the administrator fails to pay the money to the distributees in accordance with the final order or judgment of the court, after demand has been duly made upon him.²⁷

In Michigan, an administrator who fails to pay debts against an estate in accordance with an order of court must be sued within ten years from the date limited by the order to pay the debts, whether the debts are outlawed or not, if the action is debt.²⁸

74 Bonds, penal

An action on a penal bond may be brought within the time limited by the provision of the bond for the bringing of the action, although all of the damages have not accrued at the time of the commencement of the action.²⁹

²⁴ Sec. 14, c. 83, Hurd's Stat. 1909.

²⁵ 1909 Acts, p. 422 (Mich.), (9729), C. L. 1897.

²⁶ Mount v. Hunter, 58 Ill. 246, 248 (1871); Sec. 258, c. 38, Hurd's Stat. 1909, p. 803; Sec. 15, c. 83, Hurd's Stat. 1909, p. 1446.

²⁷ Frank v. People, 147 Ill. 105, 112, 113 (1893).

²⁸ Avery v. Miller, 81 Mich. 88.

²⁹ Leshner v. United States Fidelity & Guaranty Co., 239 Ill. 502, 514 (1909).

75 False imprisonment

In Illinois and in Michigan an action for false imprisonment is barred after two years from the accruing of the action.³⁰

76 Fraud and deceit

An action on the case for fraud and deceit must be brought in Illinois within five years and in Michigan within six years next after the cause of action had accrued.³¹

77 Gambling options

An action to recover back moneys paid upon options to buy or sell grain must be brought within six months after payment.³²

78 Insurance policy

A stipulation not sue after a certain period contained in an insurance policy is binding upon the insured, and no action can be brought after the prescribed period, unless prevented by the insurer's fraud, or the holding out of reasonable hopes of an adjustment.³³

An action upon a fire insurance policy must be brought within twelve months from the end of the sixty days, and not from the fire, under a provision in the policy limiting the commencement of an action thereunder to twelve months "next after the fire" and another provision forbidding the commencement of suit for sixty days.³⁴

79 Judgments, Illinois

Scire facias or debt may be brought to revive a dormant domestic judgment within twenty years after the date of the judgment, and not afterwards.³⁵ A claim or action founded upon a foreign judgment must be commenced within five years next after the

³⁰ Sec. 14, c. 83, Hurd's Stat. 1909; 1909 Acts, p. 422 (Mich.).

³¹ *Bates v. Bates Machine Co.*, 230 Ill. 621; *Krueger v. Grand Rapids & I. R. Co.*, 51 Mich. 142, 144 (1883).

³² *Bartlett v. Slusher*, 215 Ill. 348, 352 (1905); Sec. 132, c. 38, Hurd's Stat. 1909, p. 778.

³³ *Peoria Marine & Fire Ins. Co. v. Whitehill*, 25 Ill. 466 (1861).

³⁴ *Hogl v. Aachen Ins. Co.*, 65 W. Va. 437, 438 (1909).

³⁵ *White v. Horn*, 224 Ill. 238, 244 (1906); *Ambler v. Whipple*, 139 Ill. 311, 321 (1891); Limitation act (Hurd's Stat. 1909, p. 1447, par. 26).

cause of action had accrued, irrespective of where the action accrued, or where the parties reside.³⁶

80 Judgments, Michigan

All actions upon judgments, except judgments rendered by courts of record, must be commenced within six years.³⁷ Actions upon domestic or foreign judgments, or decrees rendered by a court of record, must be commenced within ten years of their entry, regardless of the form of the action chosen.³⁸

81 Libel

Actions for libel must be begun within one year after the accruing of the cause of action in Illinois and in Michigan.³⁹

82 Malicious prosecution

An action for malicious prosecution is barred in two years.⁴⁰ A cause of action for malicious prosecution does not arise until the expiration of two years from the making of the final order of reversal in reversed and remanded cases.⁴¹

83 Malpractice

Actions for malpractice by physicians, surgeons and dentists must be brought within two years next after the action had accrued.⁴²

84 Nonsuits, new action

In Illinois, a new action must be commenced within one year of an involuntary nonsuit.⁴³ This rule has no application to nonsuits which are voluntary.⁴⁴

³⁶ *Davis v. Munie*, 235 Ill. 620; *Ambler v. Whipple*, 139 Ill. 321; Sec. 15, Limitation act (Hurd's Stat. 1909, p. 1446).

³⁷ (9728), C. L. 1897 (Mich.).

³⁸ *Snyder v. Hitchcock*, 94 Mich. 315; (9751), C. L. 1897 (Mich.).

³⁹ Sec. 13, c. 83, Hurd's Stat. 1909; 1909 Acts, p. 422 (Mich.).

⁴⁰ Sec. 14, c. 83, Hurd's Stat. 1909.

⁴¹ *McElroy v. Catholic Press Co.*, 254 Ill. 290, 292 (1912).

⁴² 1909 Acts, p. 422 (Mich.).

⁴³ *Hinchliff v. Rudnick*, 212 Ill. 569, 574 (1904); Sec. 25 Limitation act.

⁴⁴ *Koch v. Sheppard*, 223 Ill. 172, 174 (1906).

85 Penalty, statutory, Illinois

An action for a statutory penalty must be commenced within two years next after the accruing of the cause of action.⁴⁵

86 Penalties, statutory, Mississippi

An individual's action for a penalty or a forfeiture given by a penal statute must be brought within one year next after the offense was committed.⁴⁶ An action for demurrage, or for delay in transportation of goods, based upon the Railroad Commission Rules is in the nature of compensation and it is not a penalty within the meaning of section 3101 of the Code of 1906.⁴⁷

87 Personal injuries, generally, Illinois

Excluding municipalities, actions for personal injuries which do not result in death must be commenced within two years next after the accruing of the cause of action.⁴⁸ Suits for the wrongful death of persons must be brought within one year next after the cause of action had accrued.⁴⁹ The recognized distinction between the two classes of actions is that the action brought under section 14, chapter 83 of the Revised Statutes is purely for personal injuries; whereas, the action maintainable under section 2, chapter 70 of said statutes is for pecuniary loss sustained by the widow and next of kin as a result of the wrongful death.⁵⁰ In both classes of actions, the cause of action is the wrongful act or the default causing the injury or the death, and not the death. The statute, therefore, begins to run from the date of the commission or the omission of the wrongful act, neglect or default.⁵¹

88 Personal injuries, municipalities

Since 1905 suits at law in Illinois for personal injuries against cities, villages or towns must be commenced within one year from the time an injury is received, or from the time the cause of action has accrued.⁵²

⁴⁵ Sec. 14, c. 83, Hurd's Stat. 1909.

⁴⁶ Sec. 3101, Code 1906 (Miss.).

⁴⁷ *Keyston Lumber Yard v. Yazoo & M. V. R. Co.*, 53 So. 8, 11 (Miss. 1910).

⁴⁸ Sec. 14, c. 83, Hurd's Stat. 1909; *McAndrews v. Chicago, L. S. & E. Ry. Co.*, 222 Ill. 232 (1906).

⁴⁹ Sec. 2, c. 70, Hurd's Stat. 1909.

⁵⁰ *Lake Shore & M. S. Ry. Co. v. Dylinski*, 67 Ill. App. 114, 116 (1896).

⁵¹ *Leroy v. Springfield*, 81 Ill. 114, 115 (1876); *Crane v. Chicago & W. I. R. Co.*, 233 Ill. 259, 262 (1908).

⁵² *Erford v. Peoria*, 229 Ill. 546, 552 (1907).

An action against the city of Grand Rapids, Michigan, for personal injuries resulting from a defective sidewalk is barred after ten days of the injury, if no preliminary notice of the injury has been given within that time.⁵³

89 Personal injuries, railroads

Actions against a common carrier for personal injuries to their employees caused by the negligence of the common carrier, its employees or equipment, must be brought within two years from the time the cause of action has accrued.⁵⁴

90 Rent

Actions for arrears of rent must be commenced within six years of the accrual of the cause of action.⁵⁵ Rent due on a parol lease is barred in six years of the accrual of the action, whether the action is assumpsit, or debt: rent due upon a lease by indenture is barred in ten years next after the accruing of the rent provided the action is debt and not assumpsit; the one is governed by subdivision 3 (9728), the other by (9734), C. L. 1897.⁵⁶

91 Replevin bond insufficient

An action on the case for the failure to take a sufficient replevin bond must be commenced within three years next after the accrual of the cause of action.⁵⁷

92 Sale of real estate

In the absence of statute, an application for the sale of a decedent's real estate must be made within seven years, unless a longer delay is satisfactorily explained;⁵⁸ and when an order of sale is entered, execution must be issued and the order enforced within seven years of its entry. If not so enforced the order must be revived by bringing the parties into court within twenty years of the entry of the original order, which will only be revived when there is something in the condition of the title which

⁵³ *Moulter v. Grand Rapids*, 155 Mich. 165, 168 (1908); 1905 Local Acts, No. 593, tit. 16, secs. 5, 6.

⁵⁴ 1909 Acts, p. 210 (Mich.).

⁵⁵ (9728), C. L. 1897 (Mich.).

⁵⁶ *Stewart v. Sprague*, 71 Mich. 50, 60 (1888).

⁵⁷ Secs. 12, 13, c. 119, *Hurd's Stat.* 1909, p. 1820.

⁵⁸ *Graham v. Brock*, 212 Ill. 579, 581 (1904); *White v. Horn*, 224 Ill. 243, 245.

has prevented a sale, but not if it is a mere question of market value.⁵⁹

The application for the sale should not be made until after the determination of a homestead, and then only within a reasonable time thereafter, not to exceed seven years from the death of the owner of the homestead.⁶⁰

Creditors are bound to wait until the homestead estate is terminated and they do not lose their right to enforce payment of their proved claims from real estate by its increase in value during the time that the law requires them to withhold proceedings to enforce payment.⁶¹

93 Seduction

In Illinois actions for seduction or criminal conversation must be commenced within two years.⁶² In Michigan the action for seduction must be brought within six years.⁶³

94 Slander

An action for slander must be commenced within one year in Illinois and two years in Michigan, next after the accruing of the cause.⁶⁴

95 Stockholder's liability

A stockholder's liability to creditors of an insolvent corporation is barred within ten years from the contracting of the indebtedness by the corporation.⁶⁵

96 Suggestion of claim for mesne profits

The action or proceeding for *mesne* profits must be commenced in Illinois within one year of the recovery of the judgment in ejectment, and the damages which are recoverable are for five years immediately preceding the filing of the suggestions of claim for *mesne* profits.⁶⁶

⁵⁹ White v. Horn, 224 Ill. 243, 245.

⁶⁰ Frier v. Lowe, 232 Ill. 622, 627 (1908).

⁶¹ Atherton v. Hughes, 249 Ill. 317, 323, 324 (1911).

⁶² Sec. 14, c. 83, Hurd's Stat. 1909.

⁶³ Watson v. Watson, 53 Mich. 168, 178 (1884); Stoudt v. Shepherd, 73 Mich. 588, 597 (1889).

⁶⁴ Sec. 13, c. 83, Hurd's Stat. 1909; 1909 Acts, p. 422 (Mich.).

⁶⁵ Schalucky v. Field, 124 Ill. 617, 622 (1888); Sec. 16, c. 83, Hurd's Stat. 1909, p. 1446.

⁶⁶ Ringhouse v. Keener, 63 Ill. 230, 234, 235 (1872); Sec. 43, Ejectment act (Ill.).

97 Taxes, money paid as

A tax buyer who purchases under a void sale may recover back the amount of his bid and the taxes paid thereafter to protect the purchase, within five years of the making of the payments.⁶⁷

98 Waste

Actions for waste must be brought within six years next after the cause of action had accrued.⁶⁸

ACTIONS AND PROCEEDINGS

99 Assumpsit, account current

In actions to recover the balance due upon a mutual and open account current, the cause of action is deemed to have accrued at the time of the last item.⁶⁹

100 Assumpsit, contract

Actions of assumpsit founded upon any contract or liability, express or implied, must be commenced, in Michigan, within six years next after the cause of action had accrued.⁷⁰

101 Attachment of water-craft

A lien against a water-craft must be asserted within six months from the date that the claim for labor or materials is due.⁷¹

102 Case, continuing injury

A cause of action arises upon a continuing injury day by day.⁷²

103 Case, damages

The statute of limitations bars a recovery of all damages, whether nominal or substantial which are sustained prior to the time within which the law requires an action for their recovery to be brought.⁷³

⁶⁷ Joliet Stove Works v. Kiep, 230 Ill. 550, 556 (1907).

⁶⁸ (9728), C. L. 1897, subdn. 5 (Mich.).

⁶⁹ (9732), C. L. 1897 (Mich.); Sperry v. Moore's Estate, 42 Mich. 353, 357 (1880).

⁷⁰ Goodrich v. Leland, 18 Mich.

110, 117 (1869); Stewart v. Sprague, 71 Mich. 60; (9728), C. L. 1897 (Mich.).

⁷¹ Sec. 3087, Code 1906 (Miss.).

⁷² Krueger v. Grand Rapids & I. R. Co., 51 Mich. 144.

⁷³ McConnel v. Kibbe, 33 Ill. 175, 179 (1864).

104 Case, Illinois

An action on the case is barred within five years, unless the particular form of action, as actions for slander and actions for personal injuries, are made to bar sooner.⁷⁴

105 Case, Michigan

All actions upon the case founded upon any contract or liability, express or implied, except for slander or libel, must be commenced within six years after the cause of action had accrued.⁷⁵

106 Certiorari, generally

In analogy to the statute relating to the review of judgments of justices of the peace by *certiorari*, a petition for a writ to review the action of an inferior tribunal should be brought within six months from the date of the entry of the final order or judgment to be reviewed; and by analogy to the statute limiting the time within which to prosecute writs of error, the petition should be presented within period which governs the prosecution of writs of error. In either case a further delay will not bar the right, if the delay is satisfactorily explained in the petition.⁷⁶ Lapse of time alone, short of limitation for the prosecution of a writ of error, will not bar the issuing of a common law writ of *certiorari*, unless it appears that since the making of the record sought to be reviewed, and upon its assumed validity, something has been done which would cause great public detriment or inconvenience by declaring it invalid.⁷⁷ A common law writ of *certiorari* will not be granted to test the legality of the existence of a municipal corporation after long delay and acquiescence in the exercise of its powers.⁷⁸

Under the present statute, a case is reviewable upon *certiorari* to the appellate court when there is a constitutional question involved, when appellate court grants a certificate of importance, or

⁷⁴ Mount v. Hunter, 58 Ill. 249; Sec. 15, c. 83, Hurd's Stat. 1909, p. 1446.

⁷⁵ (9728), C. L. 1897, subdns. 4, 7 (Mich.); Krueger v. Grand Rapids & I. R. Co., 51 Mich. 142; White River Lig & Booming Co. v. Nelson, 45 Mich. 578, 581 (1881).

⁷⁶ Clark v. Chicago, 233 Ill. 113, 115 (1908).

⁷⁷ Schlosser v. Highway Commissioners, 235 Ill. 214, 216 (1908); Chicago v. Condell, 224 Ill. 595, 598 (1907).

⁷⁸ Deslauries v. Soucie, 222 Ill. 522, 525 (1906).

when the judgment in actions *ex contractu* exceeds the sum of \$1,000 exclusive of costs. A mere judgment for costs is not reviewable on *certiorari* in the supreme court.⁷⁹

The Michigan limitation period for writs of *certiorari* is the same as for writs of error.⁸⁰

107 Certiorari, justice's proceeding

A proceeding by *certiorari* to review a justice's judgment must be brought within six months from the time of the rendition of the judgment.⁸¹

108 Claims against estates, administrators

The bar of the statute for unrepresented claims against estates applies to claims of administrators.⁸²

109 Claims against estates, contingent

A contingent claim against an estate is barred within the time limited for the presentation of claims.⁸³

110 Claims against estates, Illinois

Prior to 1903 the limitation of claims against estates of deceased persons was two years from the date of the issue of letters of administration. Since 1903 claims against these estates must be filed within one year from the date of the issue of the letters.⁸⁴ A debtor's death extends the running of the statute of limitations to the expiration of one year from the date of the issuance of letters of administration, and the filing of a claim on the adjustment day stops the running of this statute.⁸⁵ The period fixed by statute for the presentation of claims has reference merely to the right to participate in the property inventoried. It does not affect general actions or set-offs based upon claims against decedents where the claimant is not seeking the right to a distributive share in the inventoried property.⁸⁶

⁷⁹ International Text Book Co. v. Machorn (unreported).

⁸⁰ (10499), C. L. 1897 (Mich.)

⁸¹ 1909 Hurd's Stat., p. 1405, par. 77.

⁸² *In re Hodges' Estate*, 157 Mich. 198, 201 (1909).

⁸³ *Pearson v. McBean*, 231 Ill. 536 (1907).

⁸⁴ *Hathaway v. Merchants' Loan & Trust Co.*, 218 Ill. 580, 583 (1905).

⁸⁵ *De Clerque v. Campbell*, 231 Ill. 442, 445 (1907).

⁸⁶ *Peacock v. Haven*, 22 Ill. 23, 26 (1859); Cl. 7, sec. 70, c. 3, Hurd's Stat. 1909, p. 124.

111 Claims against estates, Michigan

The general provisions of the statute of limitations are applicable to claims against decedent's estates.⁸⁷

112 Coram nobis

A motion in the nature of a writ of error *coram nobis* must be made in Illinois at any time within five years after the rendition of final judgment in the case, except in cases of minority, *non compos mentis*, or duress, in which cases the time of disability is to be excluded from the five years.⁸⁸

113 Covenant

An action of covenant in Illinois and in Michigan must be brought within ten years next after the accruing of the cause of action.⁸⁹ A cause of action for a breach of covenant accrues at the time of the breach of covenant, regardless of when the damages were sustained in consequence of the breach. And if an action of assumpsit is resorted to, the action will be barred in Michigan within six years from the breach of the covenant.⁹⁰

114 Debt, Illinois

An action of debt is barred in ten years if it is based upon a bond, promissory note, bill of exchange, written lease, written contract or any other written evidence of indebtedness.⁹¹

115 Debt, Michigan

Actions of debt upon contracts under seal must be brought within ten years next after the accruing of the cause of action.⁹² Actions of debt founded upon contract or liability not under seal, except judgments or decrees of courts of record, must be instituted within six years next after the cause of action had accrued.⁹³

⁸⁷ *Sperry v. Moore's Estate*, 42 Mich. 357.

⁸⁸ Sec. 89, Practice act 1907 (Ill.).

⁸⁹ *Stelle v. Lovejoy*, 125 Ill. 352, 358 (1888); Sec. 16, c. 83, Hurd's Stat. 1909, p. 1446; *Post v. Campan*, 42 Mich. 90, 94 (1879); (9734), C. L. 1897 (Mich.); *Stewart v. Sprague*, 71 Mich. 60.

⁹⁰ *Sherwood v. Landon*, 57 Mich. 219, 224 (1885).

⁹¹ Sec. 16, c. 83, Hurd's Stat. 1909, p. 1446.

⁹² *Stewart v. Sprague*, 71 Mich. 59; *Goodrich v. Leland*, 18 Mich. 117; (9734), C. L. 1897 (Mich.).

⁹³ (9728), C. L. 1897, subdn. 1 (Mich.).

116 Disbarment

Proceedings of disbarment are not included in the express terms of the Illinois statute of limitations, and courts will not establish a limitation by analogy to suits, unless, from the nature or the circumstances of the particular case, justice to the respondent requires it.⁹⁴

117 Distress for rent

The landlord's right to distrain is barred in Illinois in six months from the expiration of the term or the termination of the tenancy.⁹⁵

118 Ejectment, Florida

The exception to the seven years' limitation period in favor of minors is applicable to persons to whom the title first accrues; it has no application to persons who are minors at the time the statute begins to run against the parent.⁹⁶

119 Ejectment, Illinois

An action of ejectment may be brought at any time within twenty years.⁹⁷ A mortgagee must bring ejectment before the indebtedness to secure which the mortgage was given, is barred under the statute of limitations.⁹⁸

120 Ejectment, Michigan

An action of ejectment by individuals or private corporations must be brought within fifteen years next after the cause of action had accrued, if the defendant claims title by adverse possession.⁹⁹ In actions by or in behalf of the state, the suit must be commenced within twenty years after the accrual of the people's right of title.¹⁰⁰

⁹⁴ *People v. Hooper*, 218 Ill. 313, 322 (1905).

⁹⁵ Sec. 28, c. 80, Hurd's Stat. 1909, p. 1409.

⁹⁶ *Armstrong v. Wilcox*, 57 Fla. 30, 34 (1909); Sec. 1723, Gen'l. Stats. 1906.

⁹⁷ *Illinois Central R. Co. v. Cavins*, 238 Ill. 380, 385 (1909).

⁹⁸ *Pollock v. Maison*, 41 Ill. 516, 519 *et seq.* (1866).

⁹⁹ *Miller v. Beck*, 68 Mich. 76, 78 (1888); *Curbay v. Bellemer*, 70 Mich. 106, 110 (1888).

¹⁰⁰ (9724), C. L. 1897 (Mich.).

121 Election contest, Illinois

Suits under the election law, like suits under the act for the removal of county seats, must be brought within thirty days after the result of election has been declared.¹⁰¹

122 Election contest, Michigan

An application to the board of county canvassers for a recount of ballots cast at a city election must be made on or before the last day on which the board is in regular session for the purpose of taking action relative to the applicant's claim to the office in controversy. It comes too late if made on the last day on which the board of canvassers is required to meet for the issuing of the certificate of election.¹⁰² No adjournment of the board of canvassers will authorize a contestant to postpone making his application.¹⁰³

123 Mandamus

A proceeding by mandamus is an action at law and should be commenced, in Illinois, within five years of the accruing of the cause of action.¹⁰⁴ Under Michigan practice, a writ of *mandamus* will not be allowed to parties who have been culpably dilatory in making the application.¹⁰⁵

124 Quo warranto

At common law neither lapse of time nor the conduct of the relator constitutes a bar to a proceeding by *quo warranto* which is not brought in the interest of the relator.¹⁰⁶ But as a part of the discretion vested in a court to grant or refuse leave to file the information, the court may consider the time that has elapsed in applying for the leave, along with all of the other circumstances of the case.¹⁰⁷ The statute of limitations relating to civil actions has no application to *quo warranto* proceedings which seek to oust a party who is charged with unlawfully exercising the office of magistracy.¹⁰⁸

¹⁰¹ *Devous v. Gallatin County*, 244 Ill. 40, 44 (1910); *Laws* 1871-72, pp. 309, 380, as amended in 1895.

¹⁰² *Newton v. Canvassers*, 94 Mich. 455, 458 (1892); Sec. 3725, C. L. 1897 (Mich.).

¹⁰³ *Drennan v. Common Council*, 106 Mich. 117, 118 (1895).

¹⁰⁴ *Kenneally v. Chicago*, 220 Ill. 485, 505 (1906).

¹⁰⁵ *People v. Judge Superior Court*, 41 Mich. 31, 38 (1879).

¹⁰⁶ *People v. Anderson*, 239 Ill. 266, 270 (1909); *People v. Karr*, 244 Ill. 374, 385 (1910).

¹⁰⁷ and ¹⁰⁸ *McPhail v. People*, 160 Ill. 77, 81 (1896).

125 Replevin

An action of replevin must be brought in Illinois within five,¹⁰⁹ and in Michigan within six¹¹⁰ years from the accruing of the cause of action. The action of replevin or trover accrues immediately upon the appropriation of the property to one's own use under a claim which is inconsistent with that of its owner.¹¹¹

126 Trespass, generally

An action for a trespass which has resulted in immediate damage accrues at the time the trespass is committed, except in cases of continuous trespass when the commission of each trespass is a new cause of action. No right of action of trespass arises unless there is concurrence of wrong and damage. The plaintiff must fix some distinct wrong upon the defendant resulting in damage within the period of the statutory limitation.¹¹²

127 Trespass, Illinois

An action of trespass to recover damages for an injury done to personal or real property is barred within five years next after the accrual of the cause of action.¹¹³

128 Trespass, Michigan

Actions of trespass upon land must be brought within two years of the accruing of the right of action.¹¹⁴

129 Trover

An action of trover is barred, in Illinois, within five,¹¹⁵ and in Michigan within six¹¹⁶ years from the accrual of the cause of action.

¹⁰⁹ Carr v. Barnett, 21 Ill. App. 137, 138 (1886); Sec. 15, c. 83, Hurd's Stat. 1909, p. 1446.

¹¹⁰ (9728), C. L. 1897, subdn. 6 (Mich.).

¹¹¹ Carr v. Barnett, *supra*.

¹¹² National Cooper Co. v. Minnesota Mining Co., 57 Mich. 83, 92, 93 (1885).

¹¹³ Sec. 15, c. 83, Hurd's Stat. 1909, p. 1446.

¹¹⁴ 1909 Acts, p. 422 (Mich.); White River Log & Booming Co. v. Nelson, 45 Mich. 581.

¹¹⁵ Sec. 15, c. 83, Hurd's Stat. 1909, p. 1446.

¹¹⁶ (9728), C. L. 1897, subdn. 6 (Mich.).

The statute of limitations runs against each separate and distinct wrongful conversion.¹¹⁷

130 Writ of error, Illinois

A writ of error must be brought within three years of the rendition of the judgment, unless, at the time of the entry of the judgment, the party aggrieved is an infant, *non compos mentis*, or under duress, in which case the time of disability is excluded.¹¹⁸ The time for suing out a writ of error does not begin to run until the judgment becomes final. If a motion for a new trial has been made and has been continued from term to term, the judgment does not become final until the motion is disposed of. This rule is applicable to cases of the fourth class reviewable under section 23 of the Chicago Municipal Court act.¹¹⁹

In the organization of a drainage district under the Levee act a writ of error may be sued out at any time within three years to review the final order organizing the district.¹²⁰

131 Writ of error, Michigan

No writ of error can issue beyond one year of the rendition of the judgment, except in case of extension of time, in case of disability and death, and in actions of debt or *scire facias*. An additional six months to the one year of limitation, but no more, may be obtained from the supreme court by special motion and upon proper showing. Persons under twenty-one years of age, insane persons, persons imprisoned for any term of years less than for life on a criminal charge, and persons under coverture, may bring a writ of error within two years after the removal of the disability; or in case of death of the person under disability, the heirs may bring error within two years after the death, provided that in either case the writ is issued within five years of the rendition of the judgment. In debt or *scire facias* the writ may be sued out within two years after the bringing of the action of debt or *scire facias*.¹²¹

¹¹⁷ *Knisely v. Stein*, 52 Mich. 380, 382 (1884).

¹¹⁸ Sec. 117, c. 110, Hurd's Stat. 1909.

¹¹⁹ *Hosking v. Southern Pacific Co.*, 243 Ill. 320, 330, 331 (1910).

¹²⁰ *Drummer Creek Drainage District v. Roth*, 244 Ill. 68, 72 (1910).

¹²¹ (10492-10496), C. L. 1897 (Mich.); *Bliss v. Caille Bros. Co.*, 157 Mich. 258, 259 (1909).

SUSPENSION OF STATUTE

132 Absence from the state

The time that a person is absent from the state is not considered in Illinois a part of the limitation period; but this has no application where both parties are nonresidents.¹²²

133 Death

Actions which survive and which have not been barred prior to a person's death, may, in Illinois, and in Michigan, be commenced by his representatives within one year after the death and the expiration of the regular period; or they may be prosecuted against the representatives of the deceased person within one year from the issuance of the letters and the expiration of the regular period of limitation.¹²³ After the statute of limitations has commenced to run against a person, its running is not interrupted by his death, notwithstanding the existence of minors.¹²⁴

134 Disability, generally

The disability of minority is not removed by appointment of a guardian, but the minor has the full period of the time, after reaching majority, within which to bring his action.¹²⁵

135 Disability, Illinois

Persons under disability have two years additional from the removal of the disability within which to bring suit. The persons under disability are minors, males under twenty-one years of age, females under eighteen years of age, *non compos mentis*, and imprisoned criminals.¹²⁶

136 Disability, Michigan

Persons under twenty-one years of age, married women, insane persons, convicts, absentees from the United States, except those who are within one of the British North America prov-

¹²² Sec. 18, c. 83, Hurd's Stat. 1909.

¹²³ Sec. 19, c. 83, Hurd's Stat. 1909; (9723), C. L. 1897 (Mich.).

¹²⁴ *Armstrong v. Wilcox*, 57 Fla. 34.

¹²⁵ *Keating v. Michigan Central R. Co.*, 94 Mich. 219, 221 (1892).

¹²⁶ Sec. 21, c. 83, Hurd's Stat. 1909.

inces, and all persons claiming under them are allowed five years from the time of the removal of the disability within which to make an entry or to bring an action for the recovery of real estate, notwithstanding the bar of the action under the other provisions of the statute.¹²⁷ The same class of persons, after their respective disabilities have been removed, are allowed the same time within which to institute personal actions as is provided for persons who are not under disabilities.¹²⁸ Since the Act of 1855, notwithstanding the Amendatory act of 1863, marriage is no longer a disability under the limitation statute, the provision of the statute concerning marriage being regarded as a repeal by implication.¹²⁹

137 Legal proceedings

During the pendency of an action on appeal or writ of error, in Illinois, the statute of limitations is suspended until the entry of final judgment.¹³⁰ So is the running of the statute arrested during the continuance of an injunction staying the commencement of the action, or during statutory prohibition.¹³¹ The statute of limitations does not commence to run against a remanded cause until the expiration of two years from the date of the rendition of the reviewing court's judgment.¹³² In Michigan, upon the arrest of a judgment, or its reversal, a new action must be brought for the same cause of action at any time within one year after the determination of the original action, or after the reversal of the judgment.¹³³

REVIVAL

138 Torts, new promise

A subsequent promise will not remove the bar of the statute of limitations against actions *ex delicto*.¹³⁴ And this is true in cases where the tort might be waived and an action of assumpsit maintained, for the foundation of the action is the tort and not the promise.¹³⁵

¹²⁷ (9718), C. L. 1897 (Mich.)

¹²⁸ (9733), C. L. 1897 (Mich.);
Watson v. Watson, 53 Mich. 178.

¹²⁹ King v. Merritt, 67 Mich. 194,
217 (1887); (8692), C. L. 1807;
Curbay v. Bellemer, 70 Mich. 110.

¹³⁰ Nevitt v. Woodburn, 160 Ill.
203, 212 (1896).

¹³¹ Sec. 23, c. 83, Hurd's Stat.
1909.

¹³² McElroy v. Catholic Press Co.,
254 Ill. 292.

¹³³ (9723), C. L. 1897 (Mich.).

¹³⁴ Nelson v. Petterson, 229 Ill.
240, 245, 247 (1907); Holtham v.
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¹³⁵ Nelson v. Petterson, *supra*.

CHAPTER V

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IN GENERAL

139 Jurisdiction defined

Jurisdiction is authority to hear and to decide a case.¹ Jurisdiction of the person is the authority obtained by process or appearance to render a personal judgment.² Jurisdiction of the subject matter is the power to hear and to determine a case of the general class to which the proceeding in question belongs.³

140 Jurisdiction, test

The power to pass upon the question, and not which way it has been decided, is the test of jurisdiction.⁴

141 Due process of law

The power to render judgment is a question of due process of law; and if a party is not amenable to service of process within

¹ People v. Superior Court, 234 Ill. 186, 199 (1908).

² and ³ People v. Harper, 244 Ill. 121, 122, 123 (1910).

⁴ People v. Belz, 252 Ill. 296, 299 (1911).

the state, a judgment is not rendered in pursuance to due process of law.⁵

142 Law and fact

Jurisdiction is not always a question of law, but it might be one of law and fact.⁶

143 Persons, nonresidents

A civil action is maintainable against a nonresident defendant and service of process may be had upon him during his voluntary attendance before a notary public.⁷

144 Persons, partners

A summons against a nonresident partner is original process, and not in aid of jurisdiction, where jurisdiction has been acquired by service of process upon a resident co-partner in a personal action. And if a court has no extra-territorial jurisdiction, it is without power to issue summons against a nonresident partner.⁸

145 Subject matter, consent

The parties to a suit cannot invest a court with jurisdiction by agreement or consent, where the law has not conferred upon the court jurisdiction of the subject matter.⁹

146 Subject matter, estoppel and waiver

The appearance of parties generally in a matter over which a tribunal lacks jurisdiction does not estop them from afterwards raising the question of jurisdiction.¹⁰ Jurisdiction over the subject matter is not waivable.¹¹

⁵ *Booz v. Texas & P. Ry. Co.*, 250 Ill. 376, 379 (1911).

⁶ *Hill Co. v. Contractors' Supply & Equipment Co.*, 249 Ill. 304, 309 (1911).

⁷ *Greer v. Young*, 120 Ill. 184, 187, 190 (1887).

⁸ *Wilcox v. Conklin*, 255 Ill. 604, 608 (1912).

⁹ *Audubon v. Hand*, 223 Ill. 367, 370 (1906); *Fisher v. Chicago*, 213

Ill. 268, 271 (1904); *Bates v. Halinan*, 220 Ill. 21, 25 (1906).

¹⁰ *Drainage Commissioners v. Cerro Gordo*, 217 Ill. 488, 494 (1905); *People v. Sangamon Drainage District*, 253 Ill. 332, 337 (1912).

¹¹ *Harty Bros. v. Polakow*, 237 Ill. 559, 563 (1909); *Highway Commissioners v. Smith*, 217 Ill. 250, 260 (1905).

147 Want of jurisdiction, notice

A court may take notice of a want of jurisdiction upon its own motion.¹²

148 Concurrent

In the courts of a state, that court which first acquires jurisdiction retains it until it makes a complete disposition of the matter; but in courts of different states, two suits may proceed until judgment is rendered in one of them. After judgment, its recovery and payment, without collusion and upon full disclosure of the suit, will bar a recovery in the other suit, regardless of which suit was first commenced. The recovery of the first judgment fixes the rights of the parties, and a judgment debtor who fails to pay it and to set it up as a bar in the other suit will not be protected. The foregoing rule is applicable to attachment and garnishment.¹³ The rule that a court which first acquires jurisdiction retains it until final disposition of the subject matter has no application to courts of different states.¹⁴

149 Statutory remedies

In the absence of statutory provision, statutory remedies are enforceable in courts of law only.¹⁵

150 Federal statutes, penal

A right of action which arises from a breach of duty imposed by a statute of the United States is enforceable in a state court, unless the action is penal in its nature. One state cannot enforce the penal laws of another state or country.¹⁶

151 Collateral attack, generally

The decision of a court or other tribunal cannot be attacked collaterally when it is the result of the exercise of discretion and the court or tribunal has jurisdiction; but a decision is subject

¹² *Fisher v. Chicago*, 213 Ill. 271.

¹³ *Becker v. Illinois Central R. Co.*, 250, 40, 44 (1911).

¹⁴ *Lancashire Ins. Co. v. Corbetts*, 165 Ill. 592, 605 (1897).

¹⁵ *Franklin County v. Blake*, 247 Ill. 500, 501 (1910).

¹⁶ *Chesapeake & O. Ry. Co. v. American Exchange Bank*, 92 Va. 495, 502, 504 (1896).

to collateral attack when the particular tribunal lacks jurisdiction.¹⁷

152 Collateral attack; petition, want of

The failure to find a petition upon which the jurisdiction of an inferior tribunal depends is insufficient to prove the want of such a petition.¹⁸

COURTS

153 Circuit courts, administration

The appellate jurisdiction of the circuit courts of Illinois over probate matters is limited to the particular order appealed from; and when that is disposed of, the order of the circuit court is transmitted to the county or probate court together with the original will and probate thereby revesting in the latter court full and complete jurisdiction over the administration and the parties.¹⁹

154 Circuit courts, drainage

An appeal from a classification of a drainage assessment only brings up errors, if any, in the classification of the parties appealing.²⁰

155 County and probate courts, administration

In all matters concerning the probate of wills, the county and probate courts of Illinois have original exclusive jurisdiction.²¹

156 County and probate courts, drainage

On appeal from a classification of a drainage assessment, the county court has no power to proceed *de novo*, or to interfere with the classification made by the commissioners, but it may correct errors, if any, in so far as the classification relates to the lands of persons within its jurisdiction.²²

¹⁷ McDonald v. People, 214 Ill. 83, 86 (1905).

¹⁸ People v. Ellis, 253 Ill. 369, 375 (1912).

¹⁹ Schofield v. Thomas, 231 Ill. 114, 122, 123 (1907); Dean v. Dean, 239 Ill. 424, 426, 427 (1909).

²⁰ People v. Grace, 237 Ill. 265, 268 (1908).

²¹ Schofield v. Thomas, 231 Ill. 122.

²² People v. Grace, 237 Ill. 268.

157 County and probate courts, trespass

A county court, under Illinois law, has jurisdiction in actions for damages not exceeding \$1,000 for an injury to real property, but it has no power to try title to such property.²³

158 City courts

The territorial limits of jurisdiction of a city court for the service of original process is confined to the city limits wherein the court is located.²⁴

PARTICULAR SUBJECTS

159 Attorney's lien

In the absence of statute, a court of equity is the only court which has jurisdiction to enforce a lien. By Illinois statute, an attorney's lien is enforceable at law or in chancery.²⁵

²³ Boyd v. Kimmel, 244 Ill. 545, 550 (1910).

²⁴ Maccabees v. Harrington, 227 Ill. 511, 517 (1907).

²⁵ Standidge v. Chicago Rys. Co., 254 Ill. 524, 531 (1912); 1909 Laws, p. 97 (Ill.).

CHAPTER VI

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160 Right, nature

A party's right to be sued in the county of his residence is statutory and substantial; but this right is waivable.¹

161 Privileges, legal consultation

A person is privileged from service with civil process during his necessary consultation with his attorney in a foreign county.²

162 Criminal process

Criminal process cannot be used to subject nonresidents to civil process in counties of their nonresidence.³

¹ *Humphrey v. Phillips*, 57 Ill. 132, 135 (1870); Sec. 6, Practice act 1907 (Ill.).

² *Jacobson v. Hosmer*, 76 Mich. 234, 236 (1889).

³ *McNab v. Bennett*, 66 Ill. 157, 160 (1872); Sec. 6. Practice act 1907 (Ill.).

PARTIES

163 Foreign corporations, doing business

A foreign corporation which is neither doing business nor is having a local agent in the State cannot be sued in Illinois.⁴

164 Foreign corporations, insurance companies

An action against a foreign insurance company as sole defendant, upon a policy of insurance issued upon the life of a person who did not reside at the date of the policy, or at the date of his death, in the county of its statutory agent, must be brought in Virginia, in the county of such agent's residence.⁵

165 Foreign corporations, personal injuries

In Virginia an action for personal injuries against a foreign corporation may be instituted in the county where the injury occurred and process may be served upon the statutory agent in the county of his appointment or residence.⁶

166 Municipal corporations, Illinois

The bringing of suits by and against counties is purely statutory. All local or transitory actions against a county must be prosecuted in any court of general jurisdiction in the county against which the action is commenced. All local or transitory actions by a county must be commenced in the county in which the defendant resides.⁷ A proceeding by *mandamus* is a suit or action and against a county it must be brought in the county of the defendant.⁸

167 Municipal corporations, Maryland and Michigan

In transitory actions, a municipal corporation can only be sued within its territorial limits. This is at common law and it is not changed by Maryland statute. In local actions, a muni-

⁴ *Midland P. Ry. Co. v. McDermid*, 91 Ill. 170, 173 (1878).

⁵ *Deatrick v. State Life Ins. Co.*, 107 Va. 602, 615 (1907); Secs. 3214, 3215, Code 1904 (Va.).

⁶ *Carr v. Bates*, 108 Va. 371, 376 (1908); Secs. 3215, 3220, 3224, 3225, 1104, Code 1904 (Va.).

⁷ *Schuyler County v. Mercer County*, 4 Gilm. 20, 23 (1847); Sec. 31, c. 34 Hurd's Stat. 1909, p. 627.

⁸ *McBane v. People*, 50 Ill. 503, 507 (1869); Sec. 31, c. 34, Hurd's Stat. 1909.

principal corporation is suable in the jurisdiction in which the cause of action had arisen.⁹

168 Nonresident partners

A partnership consisting of nonresident members may be sued in any county in which it is doing business and has an agent.¹⁰ The word nonresident refers to anyone who does not reside in the county or in the state. Nonresident does not mean a nonresident of the state.

169 Railroads, Illinois

An action at law against a railroad corporation having a principal office in the state may be prosecuted in the county where the cause of action has accrued, or in any county into or through which its road runs, by first having a summons issued and returned that the railroad company has no officer or agent within the county upon whom a copy of the process can be delivered for the purpose of affecting service, and by filing an affidavit of publication, publishing notice, and mailing the same as in chancery cases. This service will sustain a judgment *in personam* against it.¹¹ A corporation has a legal residence for the purpose of suit in the county in which it exercises corporate powers, and where it lawfully establishes and maintains a principal office or place of business, although not in the county where its road is located.¹²

LOCAL AND TRANSITORY ACTIONS

170 Test

Actions in tort are transitory or local in accordance with the subject of the injury, regardless of where or the means whereby the injury was committed. Thus, an action for an injury to real estate or to a private or public easement, is local; and an action for an injury to an individual is transitory, for

⁹ Phillips v. Baltimore, 110 Md. 431, 436 (1909); Sec. 62. art. 23, Code (Md.); Baltimore v. Meredith's Ford Turnpike Co., 104 Md. 351, 359 (1906); Pack, Woods & Co. v. Greenbush, 62 Mich. 122 (1886).

¹⁰ Watson v. Coon, 247 Ill. 414,

416 (1910); Sec. 13, Practice act 1907 (Ill.).

¹¹ Nelson v. Chicago, B. & Q. R. Co., 225 Ill. 197 (1907).

¹² Bristol v. Chicago & A. R. Co., 15 Ill. 436, 437 (1854); Sec. 6, Practice act 1907 (Ill.).

the reason that he has no fixed or immovable locality.¹³ In Michigan, since 1861 actions of trespass against nonresident defendants are transitory and not local.¹⁴

171 Illinois

Transitory actions must be brought in the county of the defendant's residence, or where he is found. Actions against defendants who reside in different counties should be brought in the county where one of them actually resides.¹⁵ Personal actions may be commenced and process may be issued to other counties for service upon nonresident defendants; but no judgment can be rendered against the nonresident defendants unless they appear and defend the action or there is judgment against a resident defendant.¹⁶ The court does not lose jurisdiction over a nonresident defendant, under section 2, of the Practice act, by directing a verdict in favor of a resident defendant, where the resident is made defendant in good faith and under the reasonable belief that a cause of action exists against him, and the nonresident defendant appears and defends the action.¹⁷

172 Maryland

A person is suable in the county of his residence, or in the county in which he carries on a regular business, or in which he is habitually or continuously employed in a fixed occupation connected with some branch of trade, industry, commerce, or some usual calling or profession. It is not necessary that the business should be that of the person sued, as an employee is as much within the statute as an employer. Nor is the failure to receive remuneration for services an element of exemption from the statute. But the mere transaction of one's own private affairs is not within the statute. Nor does a single transaction of a particular business constitute the carrying on of business.¹⁸

¹³ *Gunther v. Dranbauer*, 86 Md. 1, 6 (1897).

¹⁴ *Freud v. Rohnert*, 131 Mich. 606, 607 (1902); (10217), C. L. 1897 (Mich.) amended in 1903 Acts, p. 406.

¹⁵ *Sandusky v. Sidwell*, 173 Ill. 493, 495 (1898); *Harrison v. Thackaberry*, 248 Ill. 512, 515 (1911); Sec. 6, Practice act 1907 (Ill.).

¹⁶ Sec. 2, c. 110, Ill. Rev. Stat.; *Williams v. Morris*, 237 Ill. 254, 258 (1908).

¹⁷ *Lehigh Valley Trans. Co. v. Post Sugar Co.*, 228 Ill. 121, 132 (1907).

¹⁸ *Gemundt v. Shipley*, 98 Md. 657, 661 (1904); *Cromwell v. Willis*, 96 Md. 260, 266 (1903); Sec. 132, art. 75, Code (Md.).

173 Michigan

In transitory actions, residents of the state of Michigan have the statutory right to sue and to be sued in the county of the plaintiff's or defendant's domicile.¹⁹ This right is not extended to nonresidents of the state when sued;²⁰ but it is applicable to nonresidents who sue, although the action may be brought against a nonresident.²¹ The right to sue out of the county is as much substantial as it is to be sued in one's county.²² Defendants who are jointly, and not severally, liable on a contract, in ejectment, or in tort, may be sued in the county where either of them resides, and the other may be served in the county of his residence.²³

174 West Virginia

Transitory actions against nonresidents may be brought in any county where they may be found or have an estate or debts due them.²⁴

ACTIONS

175 Assumpsit

An action of assumpsit which is based upon the waiver of a trespass or injury to real estate, is transitory.²⁵

176 Attachment

In cases of attachment, jurisdiction is founded upon the presence of property or effects against which an attachment may be directed, and not upon the defendant's residence. So that a defendant's property is attachable in any county where it is found or where his creditor resides, although his residence is in a different county.²⁶ An indebtedness which is not due

¹⁹ Haywood v. Johnson, 41 Mich. 598 (1879); (10216), C. L. 1897 (Mich.) amended in 1899 Acts, p. 454.

²⁰ Atkins v. Borstler, 46 Mich. 552 (1881).

²¹ Sleight v. Swanson, 127 Mich. 436 (1901); (10216), C. L. 1897 (Mich.) *supra*.

²² Monroe v. St. Clair Circuit Judge, 84 N. W. 305, 306 (Mich. 1900); Jacobson v. Hosmer, 76 Mich. 236.

²³ (10010), C. L. 1897 (Mich.) amended in 1901 Acts, p. 354; Brown v. Bennett, 157 Mich. 654, 658 (1909).

²⁴ Coulter v. Blatchley, 51 W. Va. 163, 164 (1902); Cl. 4, sec. 1, c. 123, Code (W. Va.).

²⁵ Bradley-Watkins Co. v. Adams, 144 Mich. 142, 146 (1906); (11207), C. L. 1897 (Mich.).

²⁶ Smith v. Mulhern, 57 Miss. 591, 593, (1880); Barnett v. Ring, 55 Miss. 97 (1877).

is attachable only in the county of the debtor's residence, or last residence, or where his property is found.²⁷ In West Virginia, for the purpose of attachment and garnishment, the *situs* of a debt is the residence of the debtor, and not that of the creditor, and the debt may be attached and garnisheed in the hands of a foreign railroad corporation which is authorized to do business in the state, irrespective of where the debt was contracted or was made payable. This is based upon the construction of a railroad statute. It has no application to mercantile foreign corporations.²⁸

²⁷ Yale v. McDaniel, 69 Miss. 337, 338 (1891); Sec. 2459, Code 1880 (Miss.).

²⁸ Baltimore & O. R. Co. v. Allen,

58 W. Va. 388 (1905); Sec. 30, c. 54, Code (Sec. 2322, Ann. Code 1906 W. Va.).

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PRINCIPLES

177 Legal and equitable title

Actions on contracts must be brought by or in the name of all of the parties in whom is vested the legal interest in the

subject matter of the contract.¹ So in *ex delicto* actions, if an injury is done to property, the remedy must be sought in courts of common law by some person having an estate in the property, legal or equitable, which the law recognizes.² The equitable owner of a chose in action has a right, by virtue of his ownership, to bring an action at law as use plaintiff in the name of the party who has the legal title.³

178 Title or interest, burden of proof

Where an action on a contract is brought by several persons, they must prove their right to sue as at common law, unless they sue as partners.⁴

179 Name, legal

In the absence of statute, parties to the litigation should be designated by name and not merely by description of the person; but the failure to so designate a defendant must be taken advantage of on or before trial.⁵

180 Name, assumed

A person may be sued by a known name, and held upon a judgment under that name.⁶

181 Name, middle

At common law the middle letter is no part of the name of an individual, and it makes no difference if it is omitted, wrongly inserted or is erroneous.⁷

182 Nominal and use plaintiff

An action upon a contract expressly made for the benefit of a third person may be brought in the name of the contracting

¹ *Dix v. Mercantile Ins. Co.*, 22 Ill. 272, 276 (1859); *Larned v. Carpenter*, 65 Ill. 543, 544 (1872); *McLean County Coal Co. v. Long*, 91 Ill. 617, 618 (1879).

² *Peoria Marine & Fire Ins. Co. v. Frost*, 37 Ill. 333, 336 (1865).

³ *Foreman Shoe Co. v. Lewis & Co.*, 191 Ill. 155, 158 (1901); Sec. 23, c. 1, *Hurd's Stat.* 1909, p. 107.

⁴ *Woodworth v. Fuller*, 24 Ill. 109, 110 (1860).

⁵ *Feld v. Loftis*, 240 Ill. 105, 109, 110 (1909).

⁶ *Field v. Plummer*, 75 Mich. 437 (1889).

⁷ *Illinois Central R. Co. v. Hasenwinkle*, 232 Ill. 224, 228 (1908); *Humphrey v. Phillips*, 57 Ill. 135; *People v. Dunn*, 247 Ill. 410, 413 (1910).

party for the beneficiary's use.⁸ The real parties in interest may prosecute or defend an action at law in the name of a necessary nominal party against his protest, upon indemnifying him against costs and damages.⁹ The fact that a party is named as beneficial plaintiff, or the use of the words "for the use of," etc., does not constitute him a plaintiff in the case. The reason for using these words is merely to protect the interest of the usee against the nominal plaintiff who is a necessary party at every stage of the proceeding.¹⁰

183 Nominal and use plaintiff, *res judicata*

The bringing of an action by the nominal plaintiff and a recovery of a judgment therein is a bar to any future action by the party benefited by that action. As where suit is brought by highway commissioners on behalf of their town, the township is the beneficial plaintiff, and a judgment in such an action is a bar to any future action that might be commenced, either in the name of the township or by any agent thereof for the same cause of action.¹¹

184 Joinder

Parties who are separately liable for a portion of an indebtedness cannot be joined in one action upon the entire debt.¹²

185 Nonjoinder

The nonjoinder of necessary parties defendant in actions *ex contractu* is available even after judgment by default, where the omission to make the necessary parties appears on the face of the declaration.¹³

186 Misjoinder

In actions *ex delicto* the joinder of too few or too many plaintiffs is ground of nonsuit on the trial, although the misjoinder

⁸ Illinois Fire Ins. Co. v. Stanton, 57 Ill. 354, 356 (1870).

⁹ Sumner v. Sleeth, 87 Ill. 500, 503 (1877).

¹⁰ Hobson v. McCambridge, 130 Ill. 367, 375, 376 (1889); McCormick v. Fulton, 19 Ill. 570 (1858).

¹¹ Highway Commissioners v. Bloomington, 253 Ill. 164, 167 (1912).

¹² Union Drainage District v. Highway Commissioners, 220 Ill. 176, 180 (1906).

¹³ Cummings v. People, 50 Ill. 132, 134, 135 (1869); International Hotel Co. v. Flynn, 238 Ill. 636, 644 (1909).

of defendants is immaterial.¹⁴ The nonjoinder of persons interested with the plaintiff can be taken advantage of by plea in abatement, or in mitigation of damages. By omitting to plead in abatement, a defendant consents to a severance of the causes of action and authorizes the plaintiff to have judgment for his aliquot share for the damages sustained. This rule has no application to a statutory penalty which in its nature is indivisible.¹⁵

187 Withdrawal

In all proceedings commenced by voluntary petition, any of the subscribers may withdraw their names as petitioners at any time before final action is taken upon the petition.¹⁶

PERSONS, CORPORATIONS AND ASSOCIATIONS

188 Administrator *de bonis non*

An administrator *de bonis non* can sue for or upon only such of the goods and chattels of the intestate as remain unadministered in specie, and upon such of the debts as remain unpaid. His authority does not extend to assets which have been administered, whether properly or improperly.¹⁷

189 Assignee

An assignee of a chose in action cannot, at common law, maintain an action thereon in his own name.¹⁸ In Michigan such an assignee may sue in his own name or in the name of the assignor.¹⁹

190 Corporations

The corporation and not its agent must sue on the contract made for its benefit through an agent, although there is a writ-

¹⁴ *Murphy v. Orr*, 32 Ill. 489, 492 (1863); *Snell v. De Land*, 43 Ill. 323, 325 (1867); *Chicago v. Speer*, 66 Ill. 154, 155 (1872); *Siegel, Cooper & Co. v. Schueck*, 167 Ill. 522, 525 (1897).

¹⁵ *Edwards v. Hill*, 11 Ill. 22, 23, 24 (1849).

¹⁶ *Malcomson v. Strong*, 245 Ill.

166, 167 (1910); *Kinsloe v. Pogue*, 213 Ill. 302, 306 (1904).

¹⁷ *Newhall v. Turney*, 14 Ill. 338, 339 (1853).

¹⁸ *McLean County Coal Co. v. Long*, 91 Ill. 617, 618.

¹⁹ *Park v. Toledo, C. S. & D. R. Co.*, 41 Mich. 352, 355 (1879).

ten promise to pay the agent *eo nomine*.²⁰ Corporations may be sued for tort the same as individuals.²¹

191 Counties

At common law, counties can neither sue nor be sued; therefore, actions by or against them depend upon some special statute.²² In Illinois, under special statutory provisions, all local or transitory actions against counties must be commenced or prosecuted in the circuit court of the county against which the action is brought; and all actions commenced by counties must be brought in the county in which the defendant resides.²³

192 Executors

The title to goods, chattels and choses in action vests in the executor upon his appointment for the use of the creditors, distributees and legatees, and he alone can sue in trover, replevin, or other appropriate remedy for the recovery of personal property, or for its injury.²⁴

193 Foreign corporations

It is not necessary that a foreign corporation should qualify as such to enable it to bring suit upon a cause of action which has not arisen from an unauthorized transaction of business in the state.²⁵ If such a corporation has a good cause of action, it may sue in Illinois, regardless of whether or not it can maintain an action for the same cause of action in another state.²⁶

194 Husband and wife

A wife cannot sue her husband at common law. In Illinois a married woman cannot sue her husband in an action at law

²⁰ Southern Life Ins. & Trust Co. v. Gray, 3 Fla. 262, 366 (1850).

²¹ Harlem v. Emmert, 41 Ill. 319, 323 (1866); Kankakee & Seneca R. Co. v. Horan, 131 Ill. 288, 307 (1890).

²² Schuyler County v. Mercer County, 4 Gilm. 20, 23 (1847).

²³ Sec. 6, Act of Jan. 3, 1827 (1833 Rev. Laws, p. 139.)

²⁴ McLean County Coal Co. v. Long, 91 Ill. 619.

²⁵ Alpena Portland Cement Co. v. Jenkins & Reynolds Co., 244 Ill. 354, 361 (1910); Lehigh Portland Cement Co. v. McLean, 245 Ill. 326, 333 (1910); Sec. 6, c. 32, Hurd's Stat. 1909; Finch & Co. v. Zenith Furnace Co., 245 Ill. 586, 591, 592 (1910); Simpson Fruit Co. v. Atchison, T. & S. F. Ry. Co., 245 Ill. 596, 597 (1910).

²⁶ Finch & Co. v. Zenith Furnace Co., 245 Ill. 594.

except where her separate property is involved.²⁷ Husband and wife may sue one another in Mississippi.²⁸

195 Insane persons

At common law an action upon a contract made by an insane person could only be brought in his own name.²⁹ In Illinois this rule applies until a conservator is appointed. After the appointment of a conservator suits must be brought in his name.³⁰

196 Joint and several obligees and obligors, plaintiffs

All living obligors at the time suit is about to be commenced, must join in an action upon an obligation which is expressly made to two or more persons, notwithstanding the defeasance may provide for its discharge upon the payment of a sum of money to one of them, because, the legal interest in such a case is joint and not several.³¹ The legal interest of a party in a contract is not to be confounded with the benefit to be derived from or under it. It is the legal interest and not the benefit in the contract which determines in whose name an action on a contract, whether by parol or under seal, should be brought.

197 Joint and several obligees and obligors, defendants

In actions upon joint obligations, all living joint obligors, or promisors must be made defendants.³² On a joint and several obligation, one may be sued, or all, but not an intermediate number. In case of a joint obligor's death the survivors may be sued as if they alone were primarily liable.³³ Parties to a contract which is void as to them and valid as to others should not be joined in an action on the contract with those who are liable thereon.³⁴

²⁷ *Chestnut v. Chestnut*, 77 Ill. 346, 350 (1875).

²⁸ Sec. 2518 Code 1906 (Miss.).

²⁹ *Chicago & P. R. Co. v. Munger*, 78 Ill. 300, 301 (1875).

³⁰ Sec. 11, c. 86, Hurd's Stat. 1909, p. 1460.

³¹ *International Hotel Co. v. Flynn*, 238 Ill. 644; *Osgood v. Skinner*, 211 Ill. 229, 237 (1904).

³² *Brooks v. McIntyre*, 4 Mich. 316, 317 (1856); *Byers v. First National Bank*, 85 Ill. 423, 426 (1877).

³³ *Cummings v. People*, 50 Ill. 132, 134 (1869).

³⁴ *McLean v. Griswold*, 22 Ill. 218, 220 (1859); *Page v. De Leuw*, 58 Ill. 85, 87 (1871).

198 Joint owners

In actions in form *ex delicto* the joinder of parties plaintiff depends upon whether the specific thing, or the damages are sought to be recovered. If a recovery of the particular property is sought, all of the point owners of that property are necessary parties; if damages alone are sued for, a part of the owners alone may sue at one time and another part may sue at another time, each recovering according to their proportionate interest in the property damaged, lost, or destroyed, unless the nonjoinder of all of the owners of the property is pleaded in abatement.³⁵

199 Joint wrongdoers

A party who is injured by joint and independent acts of several persons may either elect to sue any one of them, or all or any number of them jointly, and recover against as many as the proof shows are liable; ³⁶ or after suit has been brought against all of the wrongdoers, he may exercise such an election at any time before judgment by dismissing the suit against any of them.³⁷ A release or a discharge of one joint wrongdoer, however, is a release of the other, on the principle that there can be but one recovery or satisfaction.³⁸ The common law rule that all persons who are liable for the same tort may be joined in one action, does not apply to wrongdoers who are indirectly liable, unless changed by statute.³⁹

200 Legatees

A legatee cannot maintain an action for the recovery of, or for an injury to personal property which has been willed to him, but he must do so through the executor.⁴⁰

³⁵ Johnson v. Richardson, 17 Ill. 302, 303 (1855).

³⁶ Nordhaus v. Vandalia R. Co., 242 Ill. 166, 174 (1909); Tandrup v. Sampsell, 234 Ill. 526, 530 (1908); Parmelee Co. v. Wheelock, 224 Ill. 194, 200 (1906); Severin v. Eddy, 52 Ill. 189, 191 (1869).

³⁷ Nordhaus v. Vandalia R. Co., 242 Ill. 166, 174.

³⁸ Mooney v. Chicago, 239 Ill. 414, 422, 423 (1909).

³⁹ Franklin v. Frey, 106 Mich. 76, 78 (1895).

⁴⁰ McLean County Coal Co. v. Long, 91 Ill. 618 *et seq.*

201 Minors

A praecipe may be executed and process may be sued out in the name of minors before the appointment of *prochein amy* or guardian.⁴¹

202 Nonresidents

A nonresident cannot, against his objection, be made a party to a proceeding in the nature of an interpleader, by personal service upon him beyond the jurisdiction of the court.⁴²

203 Partners

In *ex contractu* actions all ostensible and publicly known members of the firm at the time of the making of the contract to be sued upon must be joined as defendants.⁴³ The same is true in cases of a partnership consisting of an infant and an adult, as such a partnership is not void.⁴⁴ It is optional for the plaintiff to join or omit secret or nominal partners unless he knows, or has notice, of their existence and by the omission to join them, the defendant is deprived of presenting a defense in the nature of set off or recoupment.⁴⁵

204 Receivers

The receivers of corporations alone are proper parties defendant to an action for personal injuries resulting while they are in control and possession of the corporate properties.⁴⁶ Receivers may be sued as joint wrongdoers.⁴⁷

205 Religious organizations

Under former Illinois law religious societies could sue only by their trustees.⁴⁸ The present laws relating to religious

⁴¹ *Stumps v. Kelley*, 22 Ill. 140, 141 (1859).

⁴² *Dexter v. Lichliter*, 24 App. D. C. 222, 227 (1904); Sec. 1531, Code (D. C.).

⁴³ *Page v. Brant*, 18 Ill. 37, 38 (1856); *Goggin v. O'Donnell*, 62 Ill. 66, 67 (1871); *Blackwell v. Reid & Co.* 41 Miss. 102 (1866).

⁴⁴ *Osborn v. Farr*, 42 Mich. 134 (1879).

⁴⁵ *Lasher v. Colton*, 225 Ill. 234, 237, 239 (1907); *Page v. Brant*, 18 Ill. 38.

⁴⁶ *Henning v. Sampsell*, 236 Ill. 375, 381 (1908).

⁴⁷ *Tandrup v. Sampsell*, 234 Ill. 526, 533 (1908).

⁴⁸ *Ada Street Methodist Episcopal Church v. Garnsey*, 66 Ill. 132, 133 (1872).

organizations require suits by and against them to be brought in the name under which they are organized.⁴⁹

206 School districts, discontinued

Upon the discontinuance of a school district in Illinois, an action for a breach of contract may be brought against the board of education of the township of the discontinued district.⁵⁰

207 State board of health

The State Board of Health is a branch of the executive department of the government; it is neither a corporation, an association, nor an individual.⁵¹

208 Townships and highway commissioners

Incorporated townships may sue in their corporate names.⁵² The institution of an action in the name of the highway commissioners in place of that of the township is a waivable irregularity, and an objection on that ground comes too late when first urged in the reviewing court.⁵³

209 Voluntary associations

At common law all of the members of a voluntary association should be joined as parties to an action. The name of a society cannot be used in suing. On the principle of waiver, however, a voluntary association is bound by a judgment which has been rendered against its society name, where the association assumed a corporate name, where it has exercised corporate powers, and where it has been sued and has been served as a corporation and the want of proper parties is urged for the first time on appeal or in a collateral proceeding.⁵⁴ A person who has been

⁴⁹ *Zion Church v. Mensch*, 178 Ill. 225 (1899); *Church of Christ v. Christian Church*, 193 Ill. 144 (1901).

⁵⁰ *Chalstran v. School District*, 244 Ill. 470, 479 (1910); Sec. 44, art. 3. School law (Hurd's Stat. 1908, p. 1920).

⁵¹ *People v. Dunn*, 255 Ill. 289, 291 (1912).

⁵² *Morris v. School Trustees*, 15 Ill. 266, 270 (1853);

⁵³ *Highway Commissioners v. Bloomington*, 253 Ill. 167; Par. 46, c. 139, Hurd's Stat. 1909.

⁵⁴ *Schuetzen Bund v. Agitations Verein*, 44 Mich. 313, 316 (1880); *Fitzpatrick v. Rutter*, 160 Ill. 282, 286 (1896); *Ada Street Methodist Episcopal Church v. Garnsey*, 66 Ill. 134; *Warfield-Pratt-Howell Co. v. Williamson*, 233 Ill. 487, 496 (1908).

made a member of a voluntary association without his authority or illegally, may be omitted as a party to the action.⁵⁵ The Grand Lodge of Illinois Odd Fellows must sue and be sued in the name of "The Grand Lodge of the State of Illinois, of the Independent Order of Odd Fellows;" subordinate lodges must sue and be sued in the name of "The trustees of Lodge No., Independent Order of Odd Fellows."⁵⁶

PRACTICE

210 Addition and substitution of plaintiff

Necessary parties plaintiff may be added to an action by amendment after verdict upon cross motion to a motion to dismiss for want of proper parties.⁵⁷ The addition of a necessary party plaintiff to an action is neither the commencement of a new suit nor the statement of a new cause of action within the meaning of the statute of limitations.⁵⁸ Thus, the cause of action is in no way affected by making the proper beneficiary plaintiff to an action upon a benefit insurance certificate in place of a person who was improperly made plaintiff.⁵⁹

211 Bankruptcy, petition for substitution of trustee

⁶⁰ And now comes, in his own proper person, by, his attorney, and shows to the court here that he has been duly appointed the trustee in bankruptcy of the above named by the district court of the United States for the district of, and by leave of the court here files in this case a certified copy of the adjudication in bankruptcy of the said, and also a certified

⁵⁵ *Boyd v. Merril*, 52 Ill. 151, 153 (1869).

⁵⁶ *Marsh v. Astoria Lodge*, 27 Ill. 421, 425 (1862); *Laws* 1849, p. 46 (Ill.).

⁵⁷ *Houglan v. Avery C. & M. Co.*, 246 Ill. 609, 619 (1910); *Sec. 1, c. 7, Hurd's Stat. 1909*, p. 154; *Sec. 39, Practice act 1907* (Ill.); *Malleable Iron Range Co. v. Pusey*, 244 Ill. 184, 196 (1910).

⁵⁸ *Houglan v. Avery C. & M. Co.*, 246 Ill. 618.

⁵⁹ *Beresh v. Knights of Honor*, 255 Ill. 128.

⁶⁰ All forms of an action should be preceded by the venue, by the name and the term of the court, and

by the title of the case, as a *caption*, thus:

State of	{ ss.
..... county.	
In the court of county	
To the term. 19....	
..... Plaintiff,	{ (Form of Action)
v.	
..... Defendant.	

It is customary to entitle all pleadings on behalf of the plaintiff as A B v. C D; and all pleadings on behalf of the defendant as C D ats. A B. The declaration, the replication, the surrejoinder and the surrebutter should be entitled as A B v. C D; whereas the plea, the rejoinder and the rebutter as C D ats. A B.

copy of his appointment as such trustee, and also a certified copy of the assignment to him of assets and effects of said bankrupt, and prays the court here that he may be substituted in the place of the said as plaintiff herein, and that he may be allowed to prosecute this suit as plaintiff in place and stead for the use of, to whom he has sold and assigned the claim and cause of action in this case.

.....
Trustee of
Bankrupt.

212 Change of defendant, petition and order

To the honorable, the judge of said court:

Your petitioner, the defendant in the above entitled cause represents unto your honor that heretofore, to wit, on or about, 19.., the corporate name of your petitioner was changed by proper amendment of its charter to that of, which amendment has been duly filed in the state of

Your petitioner therefore prays that the name of the defendant be now changed on the docket and the pleadings be so amended to that of the present name of the defendant corporation, to wit,

As is in duty, etc.

.....
Attorney for petitioner.

Ordered, this day of, 19.., by the court of that the docket be changed and the pleadings be amended as prayed.

.....⁶¹

213 Death, suggestion of, necessity

It is not necessary to suggest the death of a beneficiary who is not a party to the suit and whose death does not affect the suit in any way.⁶²

214 Death of party practice, District of Columbia

Now comes the plaintiff by his attorney and suggests to the court the death of the defendant on the day of and further suggests that letters of administration on the estate of said were, on the day of issued to who has qualified as administrator of said estate, plaintiff therefore suggests that the said in his capacity as adminis-

⁶¹ German Union Fire Ins. Co. v. Cohen, 114 Md. 130 (1910).

⁶² Reichert v. Missouri & Illinois Coal Co., 231 Ill. 238, 246 (1907).

trator of the estate of deceased be made a party
defendant to this cause.

.....
Attorney for plaintiff.

215 Death of party, practice, Illinois

Comes now the, executor and trustee under the
last will and testament of, deceased, and suggests
to the court the death of the said, who died on
....., 1..., and that the undersigned,
has been appointed and has duly qualified as executor and
trustee under the last will and testament of said,
and therefore asks that the undersigned,, as
executor and trustee under the last will and testament of
....., deceased, be substituted as defendant in the above
entitled cause.

.....
Attorneys for

216 Death of party, practice, Maryland

The plaintiff by his attorney suggests to the
court that pending this action one of the defendants
has departed this life leaving a will and appointing
and executors, and that letters testamentary have
been granted upon his personal estate to the said
and; wherefore, the plaintiff, by his attorney,
moves that the said and executors of
the estate of, deceased, be made parties defend-
ant in the above entitled cause and that summons directed to
them may be issued from this honorable court.

.....
Attorney for plaintiff.

Prayer of petition granted, and let summons issue as prayed.
..... Judge.

In the court of	v.	Suggestion of death of	Mr. Clerk: Please file Attorney for plaintiff.
--------------------------------	----	---------------------------------	---------------------------------	----------------------------------

217 Death of party, practice, Michigan*Affidavit*

..... of being duly sworn deposes and says that, the sole plaintiff in this action, the cause of which does by law survive, departed this life on the day of last, intestate; that on the day of this deponent was duly appointed sole administratrix of the said deceased, by order of the court for county in said state; and that this deponent therefore prays that the death of the said may be suggested upon the record of this cause, and that she, this deponent, may be allowed to prosecute this suit as such administratrix.

Subscribed, etc.

Order

On reading and filing the affidavit of filed in the above entitled cause and it appearing that said plaintiff, died intestate on the day of last and that was appointed sole administratrix of the estate of deceased by order of the judge of probate of county in said state on the day of

Therefore, on motion of attorney for plaintiff, it is ordered that said administratrix may appear and take upon herself the prosecution of this suit in her capacity as administratrix of said estate, as provided by the laws of said state within days after service of notice of this order upon the defendant in said cause or its attorney.

Notice

To attorney for defendant.

Please take notice that an order to revive suit by administratrix of the estate of deceased, of which the attached hereto is a copy was duly entered by order of said court in session held at the court house in the of in said county on this day of; which order was based on the affidavit of, a copy of which is hereto attached, and the records and files in said cause; and that said suit is duly revived in the name of administratrix of the estate of, deceased, plaintiff against, defendant, in accordance with said order of said court and by virtue of the statute in such case made and provided.

Dated, etc.

.....
Plaintiff's attorney.

(Attach affidavit of service)

218 Improper parties, dismissal

A motion to dismiss a suit for want of proper parties is appropriate if the defect appears on the face of the proceedings.⁶³ The dismissal from a suit of an improper party is not the commencement of a new action as to the remaining party.⁶⁴

219 Intermarriage, order of substitution

Upon suggestion of attorneys for the plaintiff that the plaintiff herein has intermarried since the institution of the above entitled case, and that her name is now, it is ordered by the court that the name of be substituted in lieu of as the name of the plaintiff herein.

220 Minority, petition for appointment of next friend, and order

The petition of of the city of, county of and state of Michigan, an infant under the age of twenty-one years, to wit, of the age of years, respectfully shows that he is about to commence a suit in the court for the county of against, a corporation organized under the laws of the state of Michigan, and doing business in the city of, to recover damages for personal injuries sustained by him while in the employ of said defendant at its plant in said city, on the day of, 19.., while wheeling castings in a wheelbarrow, and coming in contact with an unguarded emery wheel, severely injuring the back of his right hand to such an extent that he has lost the use of two fingers and greatly impairing the use of the hand.

Your petitioner respectfully prays that inasmuch as he is an infant, as above stated, his mother,, of the city of, county of and state of Michigan, a competent person, may be appointed to prosecute said suit for your petitioner, as his next friend, according to the statute in such case made and provided.

Dated, etc.

In presence of

.....
.....
.....

I hereby consent to become the next friend of in a suit to be commenced as stated in the above petition.

Dated, etc.

.....

⁶³ Conway v. Sexton, 243 Ill. 59, 62 (1909).

⁶⁴ Dickson v. Chicago, B. & Q. R. Co., 81 Ill. 215, 216, 217 (1876).

(Venue)

..... of the city of, county of
 and state of Michigan, being duly sworn, deposes and
 says that in the foregoing petition named,
 did on the day of, duly sign said petition
 in the presence of this deponent. Deponent further says that
, of the city of, county of
 and state of Michigan, also in the prayer of said petition men-
 tioned, did at the same time sign the consent or agreement
 thereunto written, as the next friend of the said,
 in the presence of this deponent.

Subscribed, etc.

Order

On reading and filing the foregoing petition duly verified,
 it is ordered that, of the city of,
 mentioned in said petition be, and she is hereby appointed as the
 next friend of, in a suit to be commenced as stated
 in the above petition.

Dated, etc.

.....
 Circuit Judge.

221 Misnomer, correction

After a plea of misnomer in abatement and a demurrer thereto,
 the plaintiff may be allowed to withdraw his demurrer and to
 amend his summons and declaration or petition to correct the
 misnomer.⁶⁵ The mere change of the description, or the cor-
 rection of a defect in the name, of a party defendant, does not
 make it a new cause of action where the identity of the action
 is not thereby destroyed.⁶⁶

⁶⁵ Heslep v. Peters, 3 Scam. 45,
 46 (1841).

⁶⁶ Wilcke v. Henrotin, 241 Ill. 169,
 175 (1909).

CHAPTER VIII

COSTS

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§§

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§§

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IN GENERAL

222 Taxing costs

The right to allow or to tax costs is purely statutory, and costs should not be awarded unless it is authorized by statute. Statutory provisions which impose costs are strictly construed.¹

¹ Galpin v. Chicago, 249 Ill. 554, 566 (1911).

223 Administrators and executors

Executors and administrators are not liable for costs in suits prosecuted by them in their official capacity, unless they act *male fide*, or they are guilty of gross negligence.²

NECESSITY OF SECURITY

224 Nominal and use plaintiff

In actions commenced by nominal and use or beneficial plaintiffs, the person for whose use the suit is brought is the real party who institutes it, and where this party is a nonresident, a bond for costs is required;³ and where the use or beneficial plaintiff is a resident, no security for costs is necessary, although the nominal plaintiff is a nonresident.⁴

225 Nonresidents, Florida

No formal security for costs is required in Florida. In rare cases, where the financial responsibility of a party is doubtful, the clerk of a court may require a small amount of actual money to be deposited with him at the time of the commencement of the suit to stand as security for costs. When that amount is exhausted by the fees charged in the case a further sum or sums may be obtained as a deposit, from time to time, until the entire costs have been covered.

226 Nonresidents, Illinois

Nonresident persons who are about to institute a suit, or non-resident beneficiaries for whose use a suit is about to be commenced, are required to furnish security for costs in all common law actions, in actions on official bonds, in actions on executor's, administrator's and guardian's bonds, and in actions on penal bonds.⁵

227 Nonresidents, Michigan

In Michigan a defendant is secured against costs by an endorsement on the writ or process of the name of the attorney,

² Burnap v. Dennis, 3 Scam. 478, 483 (1842); Selby v. Hutchinson, 4 Gilm. 319, 326 (1847); Sec. 8, c. 33, Hurd's Stat. 1909, p. 616.

³ Smith v. Robinson, 11 Ill. 119, 120 (1849).

⁴ Caton v. Harmon, 1 Scam. 581 (1839); Smith v. Robinson, *supra*; Sec. 1, c. 33, Hurd's Stat. 1909.

⁵ Sec. 1, c. 33, Hurd's Stat. 1909, p. 615.

solicitor, or other person to whom the writ is issued.⁶ In case an endorser of a writ or declaration leaves the state, the court may require new security to be given, and which, when given, relates back to the commencement of the suit.⁷

228 Nonresidents, Mississippi

It is discretionary with the clerk whether or not security for costs shall be given; and this applies to residents as well as nonresident parties.

229 State

A statutory provision requiring security for costs has no application to the state.⁸

230 Writ of error

A nonresident who prosecutes a writ of error is required to give security for costs.⁹

PRACTICE

231 District of Columbia, motion for costs

¹⁰ Now comes the defendant, by his attorney, and moves the court that an order issue requiring the plaintiff to file security for costs, for the reason that the said plaintiff is a nonresident of the District of Columbia.

.....
Attorney for defendant.

(Add notice to call up motion)

232 Illinois, application, time

A motion to require security for costs should be made before answer or plea and the trial of a case.¹¹

233 Illinois, motion to dismiss, waiver

Formerly a motion to dismiss for want of security for costs in a case of a nonresident plaintiff was considered to be in the

⁶ *Parks v. Goodwin*, 1 Doug. 56, 57 (Mich. 1843).

⁷ (9993), C. L. 1897 (Mich.).

⁸ *People v. Pierce*, 1 Gilm. 553, 555 (1844); Sec. 1, c. 33, Hurd's Stat. 1909.

⁹ *Ripley v. Morris*, 2 Gilm. 381, 382, 383 (1845); *Roberts v. Fahs*, 32 Ill. 474, 475 (1863).

¹⁰ See Section 211, Note 60.

¹¹ *Widmayer v. Davis*, 231 Ill. 42, 47 (1907).

nature of a plea in abatement, and if the motion was not made before pleading to the merits, the right to dismiss for lack of security was deemed to have been waived.¹² The present statute provides that the right to require security for costs shall not be waived by any proceeding in the cause. It is held accordingly that the right to insist upon security for costs is not waived by pleading to the action.¹³ The failure, however, to give security for costs must be urged by a motion to dismiss, or the objection is waived.¹⁴

234 Illinois, cross motion, right

Upon a motion to dismiss the suit for want of security for costs, the plaintiff may make a cross motion for leave to file the security, and the court may allow the cross motion and overrule the motion to dismiss.¹⁵

235 Maryland, motion

The defendant by attorney move that a "Rule Security for Costs" be laid upon the plaintiff, the said plaintiff being a nonresident of the state of Maryland.

.....
Attorney for defendant.

Service of copy admitted, etc.

236 Michigan, motion

Now comes the above named defendant by, his attorney, and moves the court now here for an order requiring the said plaintiff to file a bond for security for costs in the above cause, for the following reasons: First, because said has no property, real or personal, out of which an execution for costs can be collected. Second, because said defendant has a good defense to said cause on the merits. This motion is based upon the files and records in the above entitled cause, and upon the affidavits of hereto attached.

Dated, etc.

.....
Defendant's attorney.

.....
Business address.

¹² School Trustees v. Walters, 12 Ill. 154, 158 (1850); Roberts v. Fahs, *supra*.

¹³ Kimbark v. Blundin, 6 Ill. App. 539 (1880).

¹⁴ Meyer v. Wiltshire, 92 Ill. 395,

396 (1879); Sec. 3, c. 33, Hurd's Stat. 1909, p. 615.

¹⁵ Richards v. People, 100 Ill. 390, 392 (1881); Sec. 3, c. 33, Hurd's Stat. 1909.

237 Michigan, affidavits

(Venue)

..... being duly sworn deposes and says that he is
 of defendant herein, and that he
 makes this affidavit for and in its behalf, having knowledge of
 the facts therein.

Deponent further states that he has fully and fairly stated all
 of the facts upon which the defense of the defendant in the
 above entitled cause is based, to, its attorney
 herein, and after such statement, as aforesaid, he has been
 advised that the said defendant has a full and complete defense
 thereto upon the merits thereof.

And further deponent saith not.

Subscribed, etc.

(Venue)

..... being duly sworn deposes and says that he is
 the attorney for the defendant in the above entitled cause, that
 he has fully and fairly investigated all of the facts upon which
 said cause of action is based.

Deponent further says that after said investigation he believes
 that the above named defendant has a full and complete defense
 thereto upon the merits thereof.

And further deponent saith not.

Subscribed, etc.

(Venue)

..... being duly sworn deposes and says that
, the above named plaintiff is a resident of the
 of county of; that he has examined
 the records in the office of the register of deeds of the county
 of, and of the county treasurer for the county of
 and from such examination states that the above
 named has no real property in said county as
 appears by said records, out of which execution for costs could
 be collected if judgment were rendered therefor.

Deponent further says that he has made diligent search and
 inquiry to ascertain if said plaintiff is possessed of any personal
 property within said county, and after such inquiry states the
 fact to be that the said has no personal property
 within said county out of which an execution for costs could
 be collected if judgment were rendered therefor.

And further deponent saith not, etc.

Subscribed, etc.

238 Michigan, notice

To

Please take notice that on filing the plea attached hereto, the above named defendant expressly reserves the right to make a motion for security for costs, if upon investigation, the above named plaintiff is found to be not collectible.

Dated, etc.

.....

Defendant's attorney.

.....

Business address.

To

Attorney for the plaintiff.

You will please take notice that a motion, a copy of which is hereto attached, has been filed in the above cause and will be brought on for hearing on the day of, 19.., at the opening of the court on that day, or as soon thereafter as counsel can be heard.

Dated, etc.

.....

.....

Business address.

239 Mississippi, motion

Comes the defendant, by attorney, and moves the court to require the plaintiff to give security for costs, for the reasons set out in the affidavit filed in support of this motion.

.....

Defendant's attorney.

240 Mississippi, affidavit

Personally came before me, the undersigned (clerk of the circuit court of said county, or notary, as the case may be) attorney for the defendant, who makes oath that he has good reason to believe, and does believe, that the plaintiff in the above styled cause cannot be made to pay the costs of the suit in case the same shall be adjudged against him and affiant states that the defendant, as he believes, has a meritorious defense and that this affidavit is not made for delay.

.....

Sworn, etc.

241 West Virginia, motion

The defendant suggests that the plaintiff is a nonresident of this state and that he be ruled to give security for costs.

.....p. d.

By executors

And now this day of,, the defendants, the executors aforesaid, by leave of the court, suggest that the plaintiffs, appellants, are nonresidents of the state of West Virginia, and that they be required to give security for costs in this case.

SECURITY OR BOND

242 District of Columbia

The plaintiff, and, his surety, appear, and, submitting to the jurisdiction of the court, hereby undertake for themselves and each of them, their and each of their heirs, executors, administrators, successors, and assigns, to make good all costs and charges that the defendant may be put to in case the plaintiff is nonsuited, or judgment be given against him; and they further agree that such judgment against the plaintiff may be rendered against all the parties whose names are hereto affixed.

.....

Approved,, 19..

..... Justice.

No.	At Law.	.....	.....	Undertaking for security for costs.	.....
	Equity.	.....	v.		

243 Illinois

I, do enter myself security for all costs which may accrue in the above cause.

Dated, this day of

..... 16

I do hereby enter myself security for costs in this cause and acknowledge myself bound to pay, or cause to be paid, all costs

which may accrue in this action, either to the opposite party or to any of the officers of this court in pursuance of the laws of this state.

Dated, etc.

..... (Seal)

244 Michigan

We hereby become security for all costs for which the plaintiff may become liable in the within cause.

Dated, etc.

.....

245 Mississippi

We, principals, and sureties, bind ourselves to pay to defendant, the sum of dollars, unless the said shall pay all costs which may be adjudged against him in the suit of said against commenced in the court of county.

Witness our hands, this day of

The foregoing bond approved this day of

..... Clerk
 D. C.

Long form

Know all men by these presents: that we,, principals, and, sureties, are hereby firmly bound unto, sheriff and clerk of the court in the penal sum of dollars, good and lawful money of the United States for the payment of which well and truly to be made, we bind ourselves, our heirs, executors, and assigns, jointly and severally, firmly by these presents.

Sealed with our seals and dated this day of

The condition of the above obligation is such, that whereas, the above bound hath commenced a suit in the court of county, for certain reasons therein stated against

Now if the said shall well and truly, at the determination of said suit, pay and satisfy to the said

sheriff and clerk, and their successors in office, all of the costs which shall have accrued therein in said court, then the above obligation to be null and void; otherwise to remain in full force and effect.

..... (Seal)

..... (Seal)

Justification of surety

I do solemnly swear that I,, am worth the penalty stated in the above bond over and above all legal liabilities and exemptions.

.....

Sworn, etc.

Filed and approved this day of

..... Clerk.

By D. C.

246 Virginia

Know all men by these presents, that am held firmly bound unto the commonwealth of Virginia, in the sum of to be paid to the said commonwealth, for which payment, well and truly to be made, bind myself heirs, executors and administrators, firmly by these presents. And hereby waive the benefit of homestead exemption as to this obligation, and any claim or right to discharge any liability to the commonwealth arising under this bond, with coupons detached from the bonds of this state. Sealed with seal and dated this day of, in the year one thousand nine hundred and

The condition of the above obligation is such, that whereas a suit has been instituted in the court of the of by, and a suggestion on the record in court was entered by the above defendant that the above plaintiff not resident of the state of Virginia, and that security was required of for the payment of the costs and damages which may be awarded to the said defendant and of the fees due or to become due in the said suit to the officers of the said court. Now if the above bound shall well and truly pay all such fees as are due or may become due from the said to the officers of the said court in the prosecution of the said suit, and moreover shall well and truly pay to the said defendant all such costs and damages as may be awarded to in case the said plaintiff, shall be cast therein,

and condemned to pay the same, then this obligation is to be void, otherwise to remain in full force and virtue.

Executed, acknowledged, &c., in the presence of

.....

..... (Seal)

Justification of surety

In the Clerk's Office of the court of the
of

The above named this day made oath, before me, of said court, that his estate, after the payment of all his debts, and of such liabilities as he may have incurred as security for others, is worth the sum of the penalty of the above bond.

Given under my hand this day of, 19....
..... Clerk.

247 West Virginia

Know all men by these presents, that we,, principal, and and, sureties, are held and firmly bound unto the state of West Virginia, in the just and full sum of dollars, to the payment whereof, well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly, severally and firmly, by these presents, sealed with our seals and dated this day of, 19..

The condition of this obligation is such, that, whereas, and others have in the circuit court of county, in the state of West Virginia, commenced a suit at law, being an appeal from the county court of county in the matter of the probate of the will of, deceased, against and, executors, and others, and the said proponents having suggested the non-residence of the contestants and asked that bond as security for costs of said suit be given and said request having been granted by the court and such bond required, this bond is executed in pursuance thereof.

Now, therefore, if the said and others shall well and truly and faithfully pay all such costs as may be awarded against the contestants when thereto required, then this obligation to be void; else to remain in full force.

(Signatures and seals)

In the clerk's office of the circuit court of county,
West Virginia.

Taken, subscribed and acknowledged before me in my office and approved as sufficient, this day of,
....

.....
Clerk circuit court county.

Surety company

Know all men by these presents, that company of, a corporation, is held and firmly bound unto the state of West Virginia, in the just and full sum of dollars, to the payment whereof, well and truly to be made, it binds itself, its successors and assigns firmly by these presents, sealed with its seal, and dated this day of, 19..

The condition of the above obligation is such, that, whereas, in a suit now depending in the circuit court of county, wherein, a corporation, is plaintiff and is defendant, it has been suggested that the plaintiff is a nonresident of this state, and that security is required of it for the payment of costs, &c.

Now, therefore, if the said plaintiff shall well and truly pay all such costs as shall be awarded to the defendant and all fees due and to become due, in said suit, to the officers of the court, then this obligation to be void; else to remain in full force.

(Seal) By company.
....., Attorney in fact.

Acknowledged before me and approved as sufficient, this , 19..

Teste:, Clerk.

248 Filing

The filing of a cost bond at any time after the bringing of suit, even without leave of court, is a substantial compliance with the statute. The denial of a motion to dismiss the suit for want of a cost bond, amounts to leave to file it.¹⁷

249 Amendment

A bond for costs is amendable, even on motion to dismiss and cross motion to amend.¹⁸

250 Additional bond, affidavit, requisites

An affidavit in support of an application for additional security must state facts which show that the principals' and securities' circumstances have changed since the approval of the first bond.¹⁹

¹⁷ Plaff v. Pacific Express Co., 251 Ill. 243, 247 (1911).

¹⁹ Ball v. Bruce, 27 Ill. 331, 333 (1862); Sec. 4, c. 33, Hurd's Stat.

¹⁸ Shaw v. Havekluft, 21 Ill. 127, 128 (1859).

1909, p. 615.

251 Effect

A bond for costs covers all costs that may be legally taxed in the case, regardless of the person to whom they may accrue.²⁰

252 Execution, issuance

Under Illinois practice, an execution for costs may issue against the security without recovering a judgment against him.²¹

253 Execution, form (Ill.)

The people of the state of Illinois, to the sheriff of said county, greeting:

You are therefore commanded, that of the goods and chattels of (C. D.), you cause to be made the sum of dollars, and if not paid within days after demand, you will levy the same on the goods and chattels, lands and tenements of (X and Y) security for costs herein; and proceed in all things as on a writ of *fiери facias*.

Given, etc.²²

(Attach fee bill)

POOR PERSONS

254 District of Columbia, affidavit

..... being first duly sworn on oath deposes and says: I am the plaintiff in the above entitled cause and am unable to prosecute said action for the reason that I am entirely without funds or property and cannot obtain funds and am unable to pay the clerk of this court his legal fees.

.....

Sworn, etc.

255 Illinois, rules of court, validity

The rule of the Superior court of Cook county, imposing certain conditions upon applicants who seek leave to sue as poor persons is invalid.²³

²⁰ Whitehurst v. Coleen, 53 Ill. 247, 250 (1870).

²¹ Whitehurst v. Coleen, *supra*; Sec. 28, c. 33, Hurd's Stat. 1909.

²² Whitehurst v. Coleen, 53 Ill.

249; Sec. 28, c. 33, Hurd's Stat. 1909.

²³ People v. Chytraus, 228 Ill. 194 (1907).

256 Illinois, motion

Now comes the above named plaintiffs and move the court for leave to institute and prosecute this suit as poor persons and without advancing the costs thereof.

.....,
Attorney for plaintiffs.

257 Illinois, affidavit

....., being duly sworn on her oath says that she is the mother and next friend of the above named; that she and said infant plaintiffs are poor persons; that neither they nor she has any money or means whatsoever or property, except an interest in about dollars' worth of household goods purchased by her and her husband since their marriage which are now being used in their family; that she and said plaintiffs are without any means of paying costs in this suit; that she desires to institute suit against the above named defendants under the Dram Shop act of the state of Illinois; that she has used reasonable diligence to find security for costs but that she has been unable to obtain the same; and that if permitted to prosecute her suit as a poor person she has reason to believe, and does believe, that she will recover a substantial judgment against the defendants for injury to the plaintiffs' means of support, upon the following facts: that the defendants, within the last years before the beginning of this suit, by selling and giving intoxicating liquors to, the father of the above named infant plaintiffs, have caused in whole or in part his habitual intoxication; that she will prove that he has wasted his time and squandered his money at the dram-shop of the defendants; that he has neglected his business as a coal miner from which he derives an income of dollars per week when sober; that she has been compelled to perform manual labor in order to support said infant plaintiffs; that she has had to seek public charity for coal and provisions while her said husband was drunk on liquor sold or given to him by the said defendants; and that she believes said plaintiffs have a good and meritorious cause of action and will be able to establish their said charges against the said defendants. She therefore prays to be permitted to prosecute this suit of the said infants without giving security or advancing the costs in said cause.

.....
Subscribed, etc.

Order

It is hereby ordered that the above named infant plaintiffs be permitted through their mother and next friend,.....,

to institute and prosecute the above entitled cause as poor persons and without advancing any costs thereof.

.....
Judge of said court.

258 Illinois, petition to sue as next friend and as poor person

To the honorable judges of said court:

Your petitioner, C. B., respectfully represents unto your honors that she is a resident of county,
....., and for years last past has acted in the capacity of probation officers for the juvenile court; that she knows the plaintiffs in this suit; that their names and ages are as follows: (Insert names and ages) that since she first knew them in, 1...., they have resided at street with their father,, and their mother; that their father is an habitual drunkard and does practically nothing for the support of his wife and family; that the mother earns money for groceries and coal by doing washing and scrubbing, while the oldest daughter cares for the other children who are not at school; that the mother is under the control and in fear of her husband, who is a strong man able to work at his trade as a carpenter, and their mother, on account of such fear, is unwilling and incompetent to represent said minors in court in this case.

Your petitioner would further show that, the father, has worked as a saloon porter in the saloons of
....., the defendants in this case; and that he has received as compensation for his work the liquor that he has drunk; that said minors have no property whatever, and are of such tender years that they are unable to earn money with which to pay the costs of this suit; and that their parents are both without property.

Your petitioner would therefore pray that she may be appointed by the court as the next friend of said minors and empowered to secure an attorney to prosecute this suit against the above defendants under the Dram Shop act for their liability to the above named minors, plaintiffs; and that the court may, in its discretion, allow said minors by her as next friend to prosecute their suit in this court without costs.

.....
(Verification)

Order

On the petition of, and the affidavit of
....., it is hereby ordered that the said be, and she is hereby appointed the next friend of, and
....., minors, and is authorized to employ an attorney

and to prosecute a suit against, and
 under the Dram Shop act for their liability to the
 above named minors. It is further ordered that said minors by
, their next friend, prosecute their suit without
 costs, *in forma pauperis*.

Enter

Judge.

259 Mississippi

Personally appeared before the undersigned authority
, plaintiff in the above styled cause, who makes and
 subscribes to the following oath:

I,, do solemnly swear that I am a citizen of the
 state of Mississippi, and that on account of my poverty, I am
 not able to pay the costs or give security for the same in the
 suit of v. now pending in the
 court of county, Mississippi, which
 I have begun; and that to the best of my belief, I am entitled
 to the redress which I seek by said suit.

Sworn, etc.

260 West Virginia

This day personally appeared before me, the undersigned
 authority in and for said county and state, one
 and upon his oath says, that he is the administrator of.....
, deceased, and that, as such administrator, he is
 plaintiff in a certain action of trespass on the case, now pend-
 ing in the court of county,
 against, and that he is unable to give a
 bond for costs, and prays that he be permitted to prosecute said
 action without giving such bond, under section 2, chapter 138
 of the Code of West Virginia.

Administrator of

Taken, subscribed and sworn to before me, etc.

CHAPTER IX

PRAECIPE

IN GENERAL

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FORMS

264 District of Columbia

IN GENERAL

261 *Præcipe*, defined

A *praecipe* is an application to the clerk of a court to require the defendant to appear and to defend an action at a subsequent term.¹

262 Necessity of *praecipe*

In Florida and in Illinois suits at law are commenced by *praecipe*. A civil suit is commenced in Mississippi by declaration; no *praecipes* are used. The summons is very general and the clerk does not find it difficult to make out a summons from the declaration itself.

263 Requisites

In actions against receivers the *praecipe* should describe the defendant as receiver and not receiver.²

FORMS

264 District of Columbia

³The clerk of said court will please issue summons against
, administrator of the estate of

.....
 Attorney for plaintiff.

¹ *Schroeder v. Merchants & Mechanics' Ins. Co.*, 104 Ill. 71, 75 (1882).

² *Wilcke v. Henrotin*, 241 Ill. 169, 174 (1909).

³ See Section 211, Note 60.

Alias summons

The clerk of said court will please issue *alias* summons for the defendant.

265 Florida

To the clerk of said circuit court:

You will please issue a summons *ad respondendum* in the above entitled cause of action to of county, Florida, defendant in the above entitled cause of action, and make same returnable to the Rule day of, 19..

Dated, etc.

.....
Plaintiff's attorney.⁴

Affidavit

Personally appeared before me, clerk of the circuit court aforesaid, who, being by me duly sworn, says that the above suit for (Name action, as *assumpsit*, etc.,) is brought in good faith and with no intention to annoy the defendant ... and that the cause of action accrued in the county of, in which the suit is brought.

Subscribed, etc.

266 Illinois

The clerk of said court will issue⁵ a summons in the above entitled cause to said defendant in a plea of⁶ to the damage of said plaintiff in the sum of⁷ dollars, direct the same to the sheriff of county to execute, and make it returnable to the term of said court, 19..

Dated, etc.

.....
Plaintiff's attorney.

To, Clerk.

⁴ In Florida, *praecipies* for summons are the same in all actions, the form of the action is shown from the caption.

⁵ When suit is commenced by *capias*, say, "writ of *capias ad respondendum*." In *assumpsit* and attachment in aid insert "summons and writ of attachment."

⁶ If *assumpsit* say, "trespass on the case on promises;" if case, "trespass on the case;" if covenant, "covenant;" if debt,

"debt;" if *detinue*, "detinue;" if ejectment, "trespass *quare clausum fregit*—ejectment," or "ejectment;" if *replevin*, "replevin;" if trespass *quare clausum fregit* or trespass *vi et armis*, "trespass;" if trover, "trespass on the case-trover."

⁷ State the amount to be demanded in the *ad damnum*, unless suit is commenced by *capias*, when the true amount should be given.

267 Maryland

Under Maryland's practice, the *praecipe* appears on the back of the declaration, after the number and the title of the case. See the declaration.

268 Michigan

To the clerk of said court:

Let a writ of issue in the above entitled cause.

Action of

Damages

Dated,, 19..

Attorney.. for

Business address

No.....						
Circuit court						
for the county						
of .....	||	.....	||	Praecipe for		
		v.		.....	
		.....		||	Action of	
					Damages	
					
					Atty.. for...	
					Business ad-	
					dress	

269 Virginia

Action of detinue to recover the following personal property:
(Describe each item and give its value.)

Damages \$.....

Summon to the first rules

..... p. q.

CHAPTER X

PROCESS

IN GENERAL

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IN GENERAL

270 Process, style

When the law expressly directs process to be in a specified form and to be issued in a particular manner, the form and the manner prescribed must be followed in every particular, or the process is absolutely void. Thus if the constitution or the statute expressly requires all process to run in a certain way, to be under a certain seal and to be tested in the name of a certain officer, the failure to follow these requirements renders the process void, for the reason that these provisions are mandatory.¹ This rule is applicable to all orders, judgments, or writs in the nature of process.² Defects in process to compel an appearance, make the process void only in a limited sense when the defendant's appearance is actually entered, as issuance and service of process are waivable by general appearance. In Illinois process must run: "In the name of the people of the state of Illinois."³ The constitutional provision requiring process to run in the name of the people applies to

¹ Sidwell v. Schumacher, 99 Ill. 426, 433 (1881); Forbes v. Darling, 94 Mich. 621, 627 (1893).

² Sidwell v. Schumacher, 99 Ill. 437.

³ Sec. 33, art. VI, Const. 1870 (Ill.).

original and final process known to the common law, as summonses, executions or fee bills; it has no application to special statutory proceedings which are unknown to the common law, unless the legislature has expressly so directed.⁴ Under the present and former constitutions of Michigan, the style of all process must be: "In the name of the people of the state of Michigan."⁵

271 Process, void; notice

An officer who has notice that the process is void, acts at his peril.⁶

272 Service, persons interested

Service of jurisdictional process upon a person who stands in a fiduciary or a representative relation to others or to the subject matter to be affected by the action or proceeding and who has some personal interest which is antagonistic to those whom he represents, is ineffectual to bind them; and statutory authority to make such service is invalid.⁷

273 Service, tenants

An officer, in serving process, has no power to force the outer door of a tenant who is in the occupation of a distinct portion of a building occupied by several separate tenants, although the officer may be within the building.⁸

SUMMONS

274 Nature and effect

At common law the issuance of a summons constitutes the commencement of a suit for the purpose of arresting the statute of limitations.⁹ The issuing of the first summons in an action is the commencement of the suit; the omission, in good faith to place the summons in the hands of the sheriff for service does not render inoperative the commencement of the suit,

⁴ *Curry v. Hinman*, 11 Ill. 420, 423, 424 (1849).

⁵ (9984), C. L. 1897 (Mich.).

⁶ *People v. Zimmer*, 252 Ill. 9, 27, 28 (1911).

⁷ *People v. Feicke*, 252 Ill. 414,

420 (1911); Par. 52, c. 122 Hurd's Stat. 1911.

⁸ *Stearns v. Vincent*, 50 Mich. 209, 221 (1883).

⁹ *Eylenfeldt v. Illinois Steel Co.*, 165 Ill. 185 (1897).

although it might become necessary to issue and serve a new summons.¹⁰

REQUISITES

275 Venue, resident and nonresident defendants

A summons is void if it fails to definitely show the county in which the defendant is required to appear.¹¹ A summons against several defendants who reside in different counties must be specific and clear in regard to the court to which each one of them is summoned.¹²

276 Name, people

The requirement, in Illinois, that process shall run "In the name of the people of the state of Illinois," is complied with by making the writ run thus: "The people of the state of Illinois, to the sheriff of . . . county."¹³

277 Name, middle

The middle letter constitutes no part of a person's name.¹⁴

278 Name, resident and nonresident defendants

A summons directed against defendants who reside in several counties may contain the names of all of them.¹⁵

279 Amount claimed

A plaintiff's recovery is not limited by the amount claimed in the summons, but by the amount laid in the declaration.¹⁶ In an action of debt the summons must demand a particular sum as debt, it being the foundation of the action.¹⁷

280 Return day

Previous to the Illinois Practice act of 1872, it was necessary, in circuit courts, to make a summons returnable on the first day of the next circuit court in which an action was commenced; and a summons was considered void if more than one term of

¹⁰ *Schroeder v. Merchants & Mechanics' Ins. Co.*, 104 Ill. 71, 74 (1882); Sec. 1, Practice act 1907 (Ill.).

¹¹ *Orendorff v. Stanberry*, 20 Ill. 89, 93 (1858).

¹² *Orendorff v. Stanberry*, *supra*.

¹³ *Knott v. Pepperdine*, 63 Ill. 219 (1872); Sec. 33, art. VI, Const. 1870 (Ill.).

¹⁴ *Moss v. Flint*, 13 Ill. 570, 571 (1852).

¹⁵ *Orendorff v. Stanberry*, 20 Ill. 92.

¹⁶ *Thompson v. Turner*, 22 Ill. 389, 390 (1859).

¹⁷ *Weld v. Hubbard*, 11 Ill. 573, 575 (1850).

court had intervened between the teste and the return day.¹⁸ Under the present statute, in suits commenced ten days prior to the beginning of a term of court, the summons may be made returnable on the first day of the next term of court in which the action is brought; in suits begun within less than ten days of the next term of court, the summons may be made returnable to the next term as before or to a second succeeding term of court; and all summonses may be made returnable to any term of court which may be held within three months of the date thereof.¹⁹ A summons is void if it is not made returnable at the required term.²⁰

281 Teste

In signing an Illinois summons the clerk may use the initial of his first name.²¹ In Michigan all process must be tested in the name of the chief justice, presiding justice or judge, or one of the judges of the court from which it issues, unless there is a vacancy in any of these offices, in which case the testing may be in the name of the chief justice, or one of the associate justices of the supreme court.²²

282 Seal

The seal of the court, or if there is no such a seal, then the private seal of the clerk, is an essential part of an Illinois summons; a summons is void without a seal, and should be quashed on motion.²³ Michigan process must be sealed with the seal of the court from whence it issues.²⁴

283 Endorsement

In Michigan, before the delivery of process to an officer for service, it should be subscribed or endorsed with the name of the attorney, solicitor or officer at whose instance the process was issued.²⁵ This requirement operates as a security to the

¹⁸ *Hildreth v. Hough*, 20 Ill. 331, 332 (1858); *Miller v. Handy*, 40 Ill. 448, 450 (1866); Sec. 1, c. 83, Rev. Stat. 1845 (Ill.).

¹⁹ Sec. 1, Practice act 1907 (Ill.); *Schmitt v. Devine*, 164 Ill. 537, 542, 543 (1897); *Mechanics' Savings Institution v. Givens*, 82 Ill. 157, 159 (1876).

²⁰ *Cavanaugh v. McConochie*, 134 Ill. 516, 521 (1890); *Culver v. Phelps*, 130 Ill. 217, 224 (1889).

²¹ *Bishop Hill Colony v. Edgerton*, 26 Ill. 54, 55 (1861).

²² (9984), C. L. 1897 (Mich.).

²³ *Hannum v. Thompson*, 1 Scam. 238, 239 (1835); *Anglin v. Nott*, 1 Scam. 395 (1837); *Beaubien v. Sabine*, 2 Scam. 457 (1840); Par. 62, c. 37, Hurd's Stat. 1909, p. 672.

²⁴ (9984), C. L. 1897 (Mich.).

²⁵ (9984), C. L. 1897 (Mich.).

defendant against costs, and it is substantially complied with after process has been issued by an endorsement *nunc pro tunc*.²⁶

FORMS

284 District of Columbia

In the supreme court of the District of Columbia.

.....	}	AT LAW No.
.....		
.....		
....., Plaintiff ,		
v.		
.....		
....., Defendant ,		
.....		

The President of the United States to the Defendant ,
....., greeting:

You are hereby summoned²⁷ to appear in this court on or before the twentieth day, exclusive of Sundays and legal holidays, after the day of service of this writ upon you, to answer the plaintiff's suit, and show why he should not have judgment against you for the cause of action stated in his declaration; and in case of your failure so to appear and answer, judgment will be given against you by default.

Witness, the honorable, chief justice of said court, the day of, 19..

....., Clerk.

By, Assistant Clerk.

....., Attorney.

No.	At Law.
=====	
28 Summons.	
.....	
.....	
v.	
.....	
.....	
=====	
Issued, 19....	
=====	
Served copies of the	
declaration, notice to	
plead, affidavit, and this	
summons, on the defend-	
ant,	
.....	
.....	
.....	
.....	
.....	
.....	
the .. day of, 19..	
.....	Marshal.

²⁶ Parks v. Goodwin, 1 Doug. 56, 57 (Mich. 1843).

²⁷ If it is an *alias* summons insert here "as you have before been summoned."

²⁸ Insert *alias*, if it is a second summons.

....., 19..}	
M. P.}	
Judgment for plaintiff	
by default for \$.... with	
interest on \$.....	
.....	
.....	
.....	
.....	
and costs.	

285 Florida

The State of Florida.

To all and singular the sheriffs of the state of Florida, **greeting:**

We command you to summon
 if be found within your county, personally to
 be and appear before the judge of our circuit court for
 county, judicial circuit of Florida, at the
 court house in on the day
 of next, being the rule day of said court, to answer
 in an action of

 to the plaintiff's damages dollars; and have
 then and there this writ.

Witness,, clerk of our said circuit court, this
 day of, 19..

....., Clerk.

286 Illinois

State of Illinois, }
 county. } ss.

The people of the state of Illinois,

To the sheriff of said county, **greeting:**

We command you that you summon

.....
 if he shall be found in your county, personally to be and appear
 before the court of county, on the
 day of the term thereof, to be holden at the court house, in the
 city of, in said county, on the first

Monday of, 19.., next, to answer unto

 in a plea of ²⁹, to the damage of said plaintiff , as
 it is said, in the sum of dollars.

And have you then and there this writ, with an indorsement
 thereon, in what manner you shall have executed the same.

Witness,, clerk of our said court, and the seal
 thereof, at, aforesaid, this day of
, 19..

....., Clerk.

(Seal of the court)

287 Maryland

State of Maryland, county, to wit,

To the sheriff of county, greeting:

You are hereby commanded to summon (a body
 corporate, of county), to appear before the circuit
 court for county, to be held at the court house, in
, in and for county, on the
 Monday of next, to answer unto (part-
 ners trading as) in a plea of ³⁰
 And have you then and there this writ.

Witness the honorable chief judge of our said
 court, the day of,

Issued the day of,

(Court's seal)

....., Clerk.

²⁹ In all common law actions, the summons is the same, except the designation of the form of the action and the amount claimed. In *assumpsit*, the form of the action is described as a plea of "trespass on the case on promises;" in case, as a plea of "trespass on the case;" in covenant, as a plea of "covenant;" in debt, as a plea of "debt;" or a "plea that he render to the said plaintiff dollars and cents which he owes to and unjustly detains from the said;" in detinue, as a plea of "detinue;" in ejectment, as a plea of "trespass *quare clausum fregit*—ejectment;" in replevin, as a plea of "replevin;" in trespass, as a plea of "trespass;" in trover,

as a plea of "trespass on the case-trover."

In condemnation, as "in certain petition for the condemnation of certain property in said petition described, filed in said court," omitting "to the damage," etc., and concluding with "And have you then and there," etc.

In *mandamus*, as "in a certain petition for *mandamus* filed in said court," omitting "to the damage," etc.

In *quo warranto*, as "in an information in the nature of a *quo warranto*," omitting "to the damage," etc.

³⁰ For designation of form of action, see Note 29, *supra*.

288 Michigan

State of Michigan.

The circuit court for the county of

In the name of the people of the state of Michigan.

To

You are hereby notified that a suit has been commenced against you in said court by as plaintiff, and that if you desire to defend the same, you are required to have your appearance filed or entered in the cause, in accordance with the rules and practice of the court, in person or by attorney, within fifteen days after service of this summons upon you.

Hereof fail not, under penalty of having judgment taken against you by default.

The plaintiff claims damages in said suit not exceeding dollars.

Service of this summons shall be made on or before the day of, 19.., which is the return day hereof.

Witness, the honorable, circuit judge, and the seal of said court, at the of the place of holding said court, this day of, 19..
....., Clerk.

....., Plaintiff's attorney..

Business address

289 Mississippi

The state of Mississippi, to the sheriff of county, greeting:

We command you hereby that you summon, defendant, if to be found in your county, so that be before the circuit court to be holden in and for the district of said county, at the court house thereof, in the city of, on the Monday of 19.., to answer the declaration of, plaintiff, against the said defendant, now on file in the clerk's office of said court. And have then there this summons.

The amount actually demanded in this suit is the sum stated in said and lawful interest and costs.

Judgment will be demanded at return term.

Issued the day of 19..

..... p. q.

Declaration filed when summons issued.

Attest:

....., Clerk.
....., D. C.

290 Virginia

Commonwealth of Virginia, to the sergeant of the city of
, greeting:

We command you that you summon to appear
 in the clerk's office of our court of law and chancery of the city
 of, at the rules to be holden for the said court, on
 the Monday in, 19.., to answer,
 trading as of a plea of ³¹

And have then and there this writ.

Witness,, clerk of our said court at his office, this
 day of, 19.., in the year of our founda-
 tion.

Teste:

., Clerk.
 By, D. C.

291 West Virginia

State of West Virginia, to the sheriff of county,
 greeting:

We command you that you summon, if he be
 found in your bailiwick, to appear before the judge of our circuit
 court for the county of, at rules to be held in the
 clerk's office of said court on the first in
 next, to answer in a plea of ³²

And have then and there this writ.

Witness clerk of our said court, at the court
 house of said county, in the city of, on the
 day of, 19.., and in the year of the
 state.

., Clerk.
 By, D. C.

RETURN

292 Officer's authority, deputy

But one return can be made of a writ whether the return
 is made before or on the return day.³³ A return of process
 made by a deputy sheriff in his own name is valid under Michi-
 gan statute, although not so at common law.³⁴

³¹ Here insert the particular form
 of action and the amount of dam-
 ages, thus: "debt on negotiable
 note, damages \$.;" or "tres-
 pass on the case, damages \$."

³² The form of the action and the
 damages are designated the same
 as in Virginia.

³³ Eaton v. Fullett, 11 Ill. 491,
 493 (1850).

³⁴ Calender v. Olcott, 1 Mich. 344,
 347 (1849); Wheeler v. Wilkins, 19
 Mich. 78, 80 (1869).

293 Special deputy; return, requisites

The return of a summons by a special deputy may be in the form of an affidavit.³⁵

294 Special deputy; appointment and return

I hereby deputize and appoint, special deputy to serve the within summons.

Dated, etc.

.....
Sheriff.

Service

Served the within writ on the within named defendants
. and by reading the same and delivering to each of them a true copy thereof this day of, 19..

....., Sheriff.
By , Special Deputy.

Affidavit

(Venue)

I solemnly swear that I served the within writ as special deputy at the time and in the manner as in my return thereto set forth, and that said return is in every way and particular true.

Subscribed, etc.

.....

295 Return, validity

The omission in the return of a summons of the full name of the defendant does not invalidate the service, if the return shows that the summons was served upon the person named in the summons where his full name is given.³⁶

296 Return, effect

The return of summons is not conclusive of the character of the person served.³⁷

³⁵ Edwards v. McKay, 73 Ill. 570, 572 (1874).

³⁶ Verdun v. Barr, 253 Ill. 120, 126 (1912).

³⁷ Booz v. Texas & P. Ry. Co., 250 Ill. 376, 381 (1911).

297 Individuals, Illinois

The return of process must show on whom, in what manner, and when service was made.³⁸ The officer is not required, under Illinois statute, to date his return. He may merely state the time of service in his endorsement.³⁹ The actual placing of the writ in the clerk's office constitutes the return, and the clerk's file-mark indicates the date of the return.⁴⁰

"I did on the day of, serve this writ, by reading the same to the within named dated, etc., is a good return."⁴¹

298 Individuals, Maryland

Summoned and copy of Narr. and notice to plead left with
....., one of the defendants; *non est* as to
and
....., Sheriff.

299 Individuals, Michigan

State of Michigan, }
County of..... } ss.

I hereby certify and return that on the day of
....., 19.., at in said county, I served
the within summons personally on
.....
..... defendant ... named in said summons, by then
and there, at the place and on the date above
mentioned, showing to said above named defendant
the within summons with the seal impressed thereon, and
delivering to said defendant a true copy of said
summons
.....
.....
My fees \$.....

.....
Sheriff of said county.

³⁸ Cariker v. Anderson, 27 Ill. 358, 363 (1862); Ball v. Shattuck, 16 Ill. 299 (1855); Sec. 2, c. 110, Hurd's Stat. 1909, p. 1693.

³⁹ Cariker v. Anderson, *supra*; Funk v. Hough, 29 Ill. 145, 148

(1862); Cummings v. People, 50 Ill. 132, 134 (1869).

⁴⁰ Hogue v. Corbit, 156 Ill. 540, 546 (1895).

⁴¹ Ball v. Shattuck, 16 Ill. 299.

The circuit court for the
County of
.....
.....
.....
Plaintiff.,
v.
.....
.....
Defendant..
.....
Summons.
.....
Returned and filed this
... day of, 19..
.....
Clerk.
.....
Plaintiff's attorney..

300 Individuals, Mississippi

Executed personally by delivering to a true
copy of the within writ day of,
19..
....., Sheriff.
....., Deputy Sheriff.

301 Individuals, Virginia

Executed on the day of within the county
of by delivering a true copy of the within sum-
mons in writing to in person; not
found at the place of their usual abode. I delivered a true
copy to, a member of the family over sixteen
years of age after explaining the purport of the same.
..... D. S.
For, Sheriff,
..... county.

302 Individuals, West Virginia

Executed the within summons on the within named
on the day of,, by delivering to him,
in person, a true copy thereof, in county, West
Virginia.
....., Deputy Sheriff for
....., S. M. C.

On member of family

Executed the within summons on the within named
....., on the day of,, by delivering
on that day a true copy thereof, to, at his usual

place of abode in county, West Virginia, a person found there who is a member of his family, and above the age of 16 years; giving the said information of the purport of said copy; the said not being found.

....., Deputy,
For, S. T. C.

303 Partnership, Illinois

I have duly served this writ on the within named and partners doing business under the firm name and style of, by reading the same to, and at the same time delivering a true copy thereof to agent of said copartnership, at its place of business in said county of; the within named and being nonresidents of and not found in my county, as I am therein commanded, this day of⁴²

304 Corporations, District of Columbia

Served copies of the declaration, notice to plead, affidavit and this summons on the defendant, by service on president, the day of, 19..
....., Marshal.

\$.....

305 Corporations, Illinois

In the service of process upon a corporation on any other agent or officer than the president, the return must show that the president was not found in the county.⁴³ Service on "as president" or "as secretary" is not service upon the president or the secretary of a corporation.⁴⁴

The return on a corporation under the present statute may be as follows:

⁴² *Watson v. Coon*, 247 Ill. 414, 415 (1910).

⁴³ *Chicago Planing Mill Co. v. Merchants' National Bank*, 86 Ill. 587, 588 (1877); Sec. 8, Practice act 1907 (Hurd's Stat. 1909, p. 1694).

⁴⁴ *Illinois & Miss. Tel. Co. v. Kennedy*, 24 Ill. 319 (1860); *Chicago Planing Mill Co. v. Merchants' National Bank*, 86 Ill. 589.

Served this writ on the within named defendant
 company by delivering a copy thereof to
 (cashier) of the said company, the president of said company
 could not be found in my county, the day of
 19..

....., Sheriff.
 By Deputy Sheriff.⁴⁵

306 Corporations, Maryland

Summoned company of county,
 Maryland, body corporate, by service upon
 one of the directors of the said company of
 county, by reading the summons to said
 and by leaving a copy of the summons and a copy of the declara-
 tion with said, this day of,
 19..

.....

 Sheriff.

307 Corporations, Virginia

Executed in county on the
 day of, 19.., by delivering a true copy of the
 within summons in writing to, in person, who is
 director of the within, in which county said
 resides, and said has its principal office;
 and further executed in the county of on said
 defendant of, 19.., by delivering a true copy
 of the within summons in writing to, in person,
 who is a director of the within defendant and a
 resident of the county of, in which county the
, which is a foreign corporation does business.

....., Sheriff.
 By Deputy Sheriff.

308 Corporations, West Virginia

Executed, 19.., upon the within named
 company, a corporation, by delivering an office
 copy of the within writ, in person to president of
 said corporation, in county, West Virginia, that
 being the county and state wherein the said presi-
 dent, resided at the time of said service.

..... S. W. C.
 D. S.

Mileage
 Fees \$.....

⁴⁵ Chicago & P. R. Co. v. Kaehler,
 79 Ill. 354, 355 (1875); Chicago
 Sectional E. U. Co. v. Congdon Brake

Shoe Mfg. Co. 111 Ill. 309, 312
 (1884); Sec. 8, Practice act 1907
 (Ill.).

309 Foreign corporations, Illinois

A foreign corporation which is doing business in Illinois and having agents and property there, may be served with process the same as a domestic company.⁴⁶ The agent upon whom service of summons against a foreign corporation is authorized must be one who has power to represent the corporation in the transaction of some part of its charter business. Mere solicitation of business by persons who have no other authority, does not constitute the persons agents within the meaning of the statute.⁴⁷ An officer of a foreign corporation who passes through the state on private business cannot be served with process against a corporation which is not doing business nor having an office in the state.⁴⁸

310 Foreign corporations, West Virginia

Executed the within process on the within named company, a corporation, on the day of, 19.., by on said day delivering an office copy thereof in county, West Virginia, in person, to, auditor of the state of West Virginia, and, as such auditor, attorney in fact, pursuant to chapter 39 of the Acts of 1905, of the legislature of West Virginia, to accept service of process and notice in said state for said corporation, and to be served with process and notice in said state for said corporation. The said at the time of said service being the auditor of the state, and residing, at said time in the said county of

..... S. K. C.
By, Deputy.

311 Railroad companies, Illinois

I have duly served the within by reading the same to the within named railway company, by reading to agent of the said railway company, at, Illinois, and at the same time delivering to him a true copy thereof as I am therein commanded, this day of 19.. The president, general clerk, clerk, secretary, superintendent, general agent, cashier, principal director, engineer or conductor not found in my county this day of 19..

....., Sheriff.

Mileage \$.....

Fees

⁴⁶ Mineral Point R. Co. v. Keep, 22 Ill. 9, 15 (1859); Sec. 8, Practice act 1907 (Ill.).

⁴⁷ Booz v. Texas & P. Ry. Co., 250

Ill. 380, 381 (1911); Sec. 8, Practice act (Ill.).

⁴⁸ Midland P. Ry. Co. v. McDermid, 91 Ill. 170, 173 (1878).

312 Township

I have this day executed the within writ on the
 within named defendant the town of, personally, by
 delivering to, mayor of said town, a true copy of
 this writ, this day of, 19..
 (Signatures)

AMENDMENT

313 Power of officer

Until process is actually returned to the clerk's office, the officer has power to amend it without leave of court.⁴⁹

314 Power of court, notice

A court has power to permit the sheriff to make an amendment to his return of a summons before or after judgment. Before the expiration of the term leave may be granted to the sheriff without notice. After the term has expired the amendment may be made upon reasonable notice.⁵⁰

315 Nature of amendment

A defective return of process is amendable according to the fact notwithstanding that the amendment might defeat a proceeding by motion in the nature of a writ of error *coram nobis* or any other suit, which is founded upon the original return.⁵¹

316 Person to amend

The person who made the original service and the original return is the one to amend it, although he is out of office.⁵²

PRACTICE

317 Quashing summons

A motion to quash the return of a summons on account of want of service is inappropriate after an insufficient plea in abatement has been disposed of on substantially the same grounds. Nor is such a motion proper before pleading in abate-

⁴⁹ Nelson v. Cook, 19 Ill. 440, 455 (1858).

⁵⁰ Chicago Planning Mill Co. v. Merchants' National Bank, 86 Ill. 589; Morris v. School Trustees, 15 Ill. 266, 269, 270 (1853); Rucker v. Harrison, 6 Munf. 181 (Va. 1818).

⁵¹ Spencer v. Rickard, 71 S. E. 711, 712 (W. Va. 1911); McClure-Mabie Lumber Co. v. Brooks, 46 W. Va. 732, 734 (1899).

⁵² Waite v. Drainage District, 226 Ill. 207, 212 (1907).

ment, as it amounts to a waiver of the right to so plead.⁵³ A defendant does not waive his rights under a motion to quash summons and to dismiss suit by pleading in bar of the action pending a decision upon a motion, if the pleading is merely a denial of all liability and is provisional.⁵⁴ A motion to quash a summons must indicate upon which writ the quashal is sought where two or more writs have been issued.⁵⁵ Upon quashing a summons, a final judgment should be entered against the plaintiff for costs.⁵⁶

318 Alias summons

An *alias* summons should not issue after the original has been quashed. But if an "*alias*" summons does issue, it will be regarded as the commencement of a new suit.⁵⁷

319 Amendment

The omission to name the form of the action in a summons is not a substantial defect;⁵⁸ and the objection may be obviated by an amendment.⁵⁹ So, it is permissible to allow an amendment of the summons to conform to the praecipe.⁶⁰

PUBLICATION

320 Pre-requisites

Before a person can be served by publication, he must be made a party to the proceeding.⁶¹

321 Affidavit

..... being first duly sworn on oath deposes and says:
That this affiant is the attorney for the plaintiff hereinbefore named; that the railroad company, an Illinois corporation, is the owner of certain right of way, track and property with the county of, aforesaid; that there has been returned into the office of the circuit court clerk of county, a summons duly issued out of said

⁵³ *Locomotive Firemen v. Cramer*, 164 Ill. 9, 15 (1896).

⁵⁴ *Sallee v. Ireland*, 9 Mich. 155, 158 (1861).

⁵⁵ *Cheney v. City National Bank*, 77 Ill. 562, 564 (1875).

⁵⁶ *Rattan v. Stone*, 3 Seam. 540, 541 (1842).

⁵⁷ *Rattan v. Stone*, *supra*.

⁵⁸ *Chester & T. C. & R. Co. v. Lickiss*, 72 Ill. 521, 523 (1874).

⁵⁹ *Chester & T. C. & R. Co. v. Lickiss*, *supra*.

⁶⁰ *Thompson v. Turner*, 22 Ill. 390; Sec. 1, c. 7, Hurd's Stat. 1909. p. 154.

⁶¹ *People v. Dunn*, 247 Ill. 410, 413 (1910).

office in said cause, with the following return of service thereon:
 "I return this summons not served as to the defendant
 railroad company, because I cannot find in this county,
 the president, nor any clerk, secretary, superintendent, general
 agent, cashier, principal director, engineer, conductor, station
 agent, or any agent of the said railroad company,
 this day of, 19..

....., Sheriff."

That said affiant made diligent inquiry and upon such inquiry states that neither the president of said railroad company, nor any clerk, secretary, superintendent, general agent, cashier, principal director, engineer, conductor, station agent, or any other agent of said railroad company, can be found within the said county of so that process could be served upon them, or either of them; that in making said inquiry, said affiant has inquired of, the passenger and ticket agent of railroad company, at, Illinois, of, the chief clerk in the office of the superintendent of the railroad company, at, Illinois, of, the head physician in the employ of the voluntary relief, and of, an attorney at law connected with the firm of, attorneys at, Illinois, as he is informed and believes, for the railroad company, and that none of said parties could or would give this affiant, the name of any person in the employ of the said railroad company, or in any way connected with the said railroad company, upon whom legal service could be had.

That this affiant is informed and believes that the principal place of business of the said railroad company is at, county, Illinois.

That this affidavit is made for the purpose that service may be had upon said railroad company by publication, in accordance with the statute in such case made and provided.

And further affiant sayeth not.

.....

Subscribed, etc.

322 Notice

Affidavit that the said railroad company, an Illinois corporation, is the owner of certain right of way, track and other property within the county of, and that neither the president, nor any clerk, secretary, superintendent, general agent, cashier, principal director, engineer, conductor, station agent, or any other agent of said railroad company, can be found within the county of, having been filed in the office of the clerk of said circuit court of county.

Notice is hereby given the said railroad com-

pany, an Illinois corporation, one of the defendants above named, that the plaintiff has filed his suit in said court on the common law side thereof, on the day of, 19.., charging the said defendants with trespass on the case, and that a summons thereupon issued out of said court against said defendants, returnable on the day of the term thereof, to wit, on the day of, 19.., as is by law required; and said summons having been returned by the sheriff not served as to the said above named railroad company.

Now, therefore, unless you, said railroad company, an Illinois corporation, shall be and appear before the said circuit court of county, on the day of the next term thereof, to be holden at the court house in the city of in said county, on the day of, 19.., and plead or demur to the plaintiff's declaration, the same, and the matters and things therein charged and stated will be taken as confessed, and a judgment entered against you.

In witness whereof, etc.

.....

 Circuit court clerk.

323 Certificate of mailing

I,, clerk of the circuit court of county, in the state aforesaid, do hereby certify that on the day of, 19.., being within ten days after the first publication of the notice hereunto appended, I sent by mail, postage prepaid, a true copy of said notice to railroad company, defendant, at, Illinois.

Witness my hand and the seal of said court, this day of, 19..

.....
 Clerk.

(Attach notice)

324 Proof

State of } ss.
 County of }

The (which is incorporated and doing business under and by virtue of the laws of), hereby certifies that it is the printer and publisher of the, which is a public newspaper, printed and published daily in the city of, in said county and state aforesaid. Said company further certifies that the accompanying notice, entitled "Notice to nonresidents," dated the day of, 19.., and signed by

has been published four different times, and successive weeks in the said; that is to say, in each and every copy thereof, printed and published on the following respective dates to wit: (Insert the dates of publication).

In testimony whereof, the said company has caused this certificate to be signed by its president and secretary and attested by its corporate seal, in accordance with the provisions of its by-laws, at, this day of, 19..

By, President of said corporation.

(Corporate seal)

Attest:

....., Secretary.

DECLARATION

325 Practice

Actions for the recovery of any debt or damages may be commenced in Michigan by original writ or declaration.⁶² An action of assumpsit against a municipal corporation may also be thus commenced.⁶³

CAPIAS

326 Jurisdiction

The personal actions in which a *capias* may issue in Michigan are: actions on account of a breach of promise to marry, actions for money collected by public officers, actions for any misconduct or neglect in office or professional employment, and actions for fraud and breach of trust.⁶⁴ In actions for a breach of promise to marry, the defendant is subject to arrest on a *capias* upon the conclusive presumption that fraud is the basis of the promise.⁶⁵ No *capias* can issue in an action upon an express or implied agreement growing out of a contract of agency, when there is a mere failure by the agent to pay over a balance due under the contract.⁶⁶

⁶² (9985), C. L. 1897 (Mich.) amended in 1905, p. 103.

⁶³ *Menominee v. Circuit Judge*, 81 Mich. 577 (1890). See Chapter XIII.

⁶⁴ (9996), C. L. 1897 (Mich.);

Pennock v. Fuller, 41 Mich. 153, 155 (1879).

⁶⁵ *In re Sheahan*, 25 Mich. 145 (1872).

⁶⁶ *People v. McAllister*, 19 Mich. 215, 217 (1869).

327 Practice

The practice in suits commenced by *capias* is fixed by statute and must be strictly followed.⁶⁷

AFFIDAVIT

328 Nature and scope

An affidavit for a *capias ad respondendum* is merely for the purpose of requiring the defendant to give security for the debt upon which the suit is brought, and is in no sense a pleading in the case.⁶⁸

329 Requisites

In an affidavit to hold to bail, all of the facts and circumstances constituting the ground or grounds upon which a *capias* is sought must be stated in detail and as within the personal knowledge of the affiant.⁶⁹ The affidavit should specifically allege in what way or to what extent the plaintiff is damaged.⁷⁰ It is not necessary to attach to the affidavit or to the writ of *capias* documentary evidence of the facts which are within the affiant's own knowledge and so stated in the affidavit.⁷¹ In Virginia, the code requires this affidavit to be signed only by the court in which the case is pending or the judge thereof in vacation or a justice of the peace.⁷²

330 Form, absconding, Virginia

This day appeared before me,
and made oath, and showed to my satisfaction that in a suit now
pending in the court for the
between plaintiff, and defendant,
the said plaintiff has cause of action against the said defendant
for and that there is probable cause for believing that
the said defendant is about to quit this state, unless he be forth-
with apprehended; it is therefore hereby directed that the said
..... be held to bail in the sum of dollars.
Given, etc.

⁶⁷ Fish v. Barbour, 43 Mich 19, 22 (1880).

⁶⁸ Van Norman v. Young, 228 Ill. 425, 428 (1907).

⁶⁹ People v. McAllister, 19 Mich. 217; Sheridan v. Briggs, 53 Mich. 569, 571 (1884).

⁷⁰ Fish v. Barbour, 43 Mich. 24.

⁷¹ Paulus v. Grobben, 104 Mich. 42, 48 (1895).

⁷² 2 Virginia Code Ann., p. 1594, sec. 2991.

331 Form, assault and battery

..... being duly sworn, deposes and says that he is a resident of of in said county of, and that on the day of, 19.., at the of in the county of and state of,, late of the of, with force and arms accosted and violently attacked this deponent upon the street in the city of of, where this deponent then was, and without any provocation whatever, then and there unlawfully laid hold of this deponent and with great force and violence knocked him down, and with his hands and feet dealt this deponent several violent blows upon his head, face, and other parts of his body, and gouged the eyes of this deponent, and then and there with force and arms in and upon him, this deponent, did make an assault and did beat, bruise, wound, ill-treat, and commit an assault and battery upon this deponent, by reason whereof this deponent became and was sick, and was disabled from attending to his affairs and business for a long space of time, to wit, for the space of then next ensuing, and suffered great bodily pain and mental distress, and in consequence of such beating, bruising, wounding and ill-treating this deponent was compelled to and did expend a large sum of money in procuring medicines, medical aid, and nursing, and was thereby damaged by loss of business and expenditures of money in restoring himself to health and curing himself from the injuries so inflicted, and in mental distress and bodily pain, in a large amount, to wit, the sum of dollars.

.....
 Subscribed, etc.⁷³

332 Form, conversion

..... of the of in said county and state, being duly sworn deposes and saith that he is in copartnership with of the county of and state of with whom he is engaged in the business at county and state first aforesaid, under the firm name and style of; that he makes this affidavit as well in behalf of said as of this deponent, and that he is personally acquainted with and cognizant of the facts stated and set forth in this affidavit. And this deponent saith further that on the day of, 19.., said and one purchased a certain horse known as and one

⁷³ Pease v. Pendell, 57 Mich. 315 (1885).

wagon (or any other property), for the sum of dollars of which said paid, and the said paid the remainder, by which said purchase said became the owners of said property in undivided moieties.

And this deponent further saith that on or about the day of, 19.., the said took said property into his possession and agreed with said that he would pay the keeping of said horse for the use of the same.

And this deponent further saith that on or about the day of, 19.., this deponent, in conversation with said asked him, said to put said horse into the hands of some competent person to be fitted for trotting, and that said told this deponent to go to

And this deponent further saith that on or about said day of, 19.., with the intent to defraud said and said said secretly disposed of said property, and now refuses to account, or to pay said for their interest therein.

And this deponent further saith that in conversation with said on the day of, 19.., the said told this deponent that said property was gone, and that this deponent might whistle for his interest therein, for he could never have a cent for the same.

And this deponent further saith that said, at the time said property was so aforesaid disposed of by said, owned an undivided interest therein, and that the value of said undivided was dollars:

And this deponent further saith that he verily believes that upon the aforesaid facts said have a good cause of action against said in an action of trespass on the case, and claim damages in the sum of dollars.

.....

Subscribed, etc.⁷⁴

333 Form, false representations (Illinois)

....., being first duly sworn, doth depose and say that he is the agent and attorney of the firm of of the said county and state, which firm is, and for more than a year last past has been, composed of and

Deponent further says that one is indebted to the firm of for merchandise consisting of (Describe property) which were sold and delivered by the said, from, 19.., to, 19.., to the said

⁷⁴ Wilcox v. Ismon, 34 Mich. 268, 269 (1876).

at his special instance and request, in the sum of dollars (\$.....); that said amount is now due and unpaid, and that said firm of is about to commence a suit in assumpsit at law, in the circuit court of county, in the state of Illinois, for the recovery of the amount so due from the said to the said as aforesaid.

Deponent further says that the said debt was fraudulently contracted by the said in this, that prior to the sale and delivery of any of the merchandise for which the said is indebted to the said as aforesaid, he, the said, did, on the day of, 19.., make and deliver to the said in order that he might obtain credit from said, a certain statement, partially written and partially printed, of his respectability, wealth, mercantile correspondence and connections, which statement was signed by the said, and which statement alleged that the representations therein made were to be the basis of any credit that he, the said, might require during a period of one year from the date thereof, and which statement was, at the time of the making thereof, false and untrue in the respects hereinafter set forth.

Deponent further says that said statement alleged that he, the said, was, on its date, the owner of merchandise and other personal property of the value of dollars (\$.....), which said statement this deponent says was untrue in this, that said merchandise and other personal property then owned by the said was not, at that time, worth more than dollars (\$.....).

Deponent further says that said statement alleged that he, the said, at the date of the making thereof, was the owner of first mortgage notes and bonds which were, at that time, good and collectible, of the face value of dollars (\$.....), which said statement deponent says was untrue in this, that the said notes of the face value of dollars (\$.....) were not in fact secured by first mortgages, but that of said notes, notes of the face value of dollars (\$.....) only were then secured by first mortgages, and that of the said first mentioned notes, notes of the face value of dollars (\$.....) only were then secured by second mortgages; and that the notes so secured by first and second mortgages as aforesaid were the only notes which the said then had which were secured by mortgages of any kind, and that the said did not, at the date of said statement, have any notes representing the balance of said dollars (\$.....), to wit, dollars (\$.....), and that he did not, at said time, have or own any bonds whatever.

Deponent further says that all of the notes which were secured as aforesaid, and which the said had at the time

of making said statement, were hypothecated by him within days after the making of said statement, and that said secured notes never were worth to exceed per cent of their face value.

Deponent further says that the said statement alleged that the said at the time of the making thereof, owed to grocers for merchandise not due the sum of dollars (\$.....), which said statement said deponent says was, at that time, untrue in this, that he, the said, then owed for merchandise to grocers and others at least the sum of dollars (\$.....).

Deponent further says that said statement alleged that he, the said, at the time of the making thereof, owed, in addition to said dollars (\$.....) therein mentioned, only the sum of dollars (\$.....), which statement was untrue in this, that, in addition to the indebtedness of the said as set forth in said writing, there was at that time and now is outstanding and in full force and effect, a certain judgment which was recovered against him in favor of, in the court of county, on the day of, 1..., for the sum of dollars (\$.....), and costs of suit, and that there was due and unpaid on the day of, 1..., upon said judgment and for costs and interest thereon, at least the sum of dollars (\$.....), and that said sum still remains unpaid; also that on the day of, 1..., the wife of said recovered against him, the said, in the court of county, a judgment by confession for dollars (\$.....) and costs of suit, which judgment, on the said day of, 1..., remained in full force and effect, and that there is now due upon said judgment at least the sum of dollars (\$.....), which still remains unpaid; and also that, on the last mentioned date, the said was indebted to in the further sum of dollars (\$.....) upon a judgment note signed by him, the said, upon which note judgment was entered by confession in the court of county on the day of, 1..., and that the amount of said judgment still remains unpaid; and that also that at said time he was indebted to his stepson, whose name is to deponent unknown, in the further sum of at least dollars (\$.....), which is still unpaid.

This deponent further says that the said has, since the day of, 1..., and since the sale and delivery of said merchandise to him as aforesaid, assigned and disposed of his property with intent to defraud the said; that about the day of, 1..., the said, who, at that time, owned and was conducting a store at numbers street, in the

city of, county of and state of Illinois, sold the contents of said store and certain horses and wagons used in connection with the business done at said place, to and others; that the consideration for said sale was a note for dollars (\$.....) and also lots in the village of, county,; that, at the request of said, the deed of conveyance to said lots was not made to him, the said, but to his brother,, and that no consideration whatsoever passed from the said for said conveyance, and that the title to said lots is now in the said

Deponent further says that, at the time said made said statements which are herein stated to be untrue, he, the said, knew that said statements were untrue.

Deponent further says that the said firm of, at the time of, and after the making of said statement, and prior to, and at the time of the sale and delivery of said merchandise by them as aforesaid to the said, they, the said, relied upon said statement and believed that the matters and things therein set forth were true, and believed that the said was possessed of the assets therein mentioned, and that said assets were of the value therein stated, and believed that the liabilities of the said were as therein stated, and that said liabilities were not greater than as therein stated, and that, so believing, the said did sell and deliver to the said the said merchandise above referred to, and for which the said is still indebted as aforesaid.

And he further says that said would not have sold and delivered said goods and merchandise, if the said had not made said statement, and if the said had not believed said statement and the matters and things therein set forth to be true.

Deponent further says that since the day of, 1..., the said has never notified the said or any one on their behalf, of any change in his financial condition; that said is utterly insolvent and was insolvent on the day of, 1..., when said statement was made, and has at all times since said time been insolvent, and that he, the said, knew at the time he made said statement, that he was insolvent and that his debts and liabilities were largely in excess of his assets.

Deponent further says that if the said should recover a judgment against him, the said, in a suit which the said are about to commence, that such judgment could not be collected on execution.

Deponent further says that, since the making of said statement, and the sale and delivery of said goods and merchandise, the said has made an assignment in the county

court of county; and this deponent states, on investigation, information and belief, that the estate of said in said court will not pay cents on the dollar.

Subscribed, etc.

Order

The clerk of the circuit court is hereby directed to issue a *capias ad respondendum* in favor of et al., herein before named, and against, the said to give bail in the penal sum of dollars, upon the plaintiff,, giving bond in the penal sum of dollars.

Dated, etc.

Judge court.

(Michigan)

..... being duly sworn, deposes and says that he is the agent of and copartners as and doing business as such in the city of, in the state of Michigan, and as such agent, on behalf of said, makes this affidavit, and deposes and says that, of the city of, was at said city lately engaged in the retail trade of and had there a stock of and deponent was then and there the agent and traveling salesman for said firm of, as aforesaid, and said made application to deponent and desired to purchase on credit a bill of goods for his said stock and store aforesaid. Thereupon, and before taking the order of said and giving him credit therefor, deponent, in behalf of said desired to know of said what his financial circumstances then were, and what property said then had, and what his ability to pay for the goods deponent should thereafter sell and deliver to him, said

Whereupon, said, for the purpose of procuring from said a bill of goods through this deponent as agent and salesman for said, and for the purpose of obtaining credit for a period of days with said firm of, then and there stated to this deponent, that he, the said then had a stock of goods, consisting of, of the value of dollars, and that he had on that day, to wit, paid the last dollar he owed for his said stock, and said he had dollars cash on hand, and did not owe one dollar to anybody, and was out of debt.

And deponent, believing such statement, so made to him as aforesaid as true, did make known the same to the said firm of and there and then did sell on credit and take the order of said and communicated the same to said firm of, who thereupon, believing said representations, and relying upon the representations and report thereof made by deponent, then and there did deliver to said goods, consisting of, of the value of dollars.

Deponent further says that said statement, so made as aforesaid by to deponent, was made for the express purpose and with the intent to defraud said of said bill of goods of the value of dollars as aforesaid; that said representations, when so made, were false in every particular, and said knew the same were absolutely false, and knew that he did not have a stock of goods of the value of dollars, and knew that the same did not exceed in value dollars, and knew that he was not out of debt, and knew that he was indebted in a large sum of money to divers persons, firms and corporations, and had not paid all his indebtedness on said stock, and did owe a large amount for said stock, and did not have on hand dollars in money, and knew that he could never pay for said bill of goods, and then knew that he never intended to pay for the same, and knew that he intended to cheat and defraud said of the same.

Deponent further says that soon after said ordered and received said bill of goods he sold, assigned and transferred his entire stock of goods to, the consideration for which said sale and transfer was a prior indebtedness, and for the purpose of defrauding the said

And this deponent further says that he verily believes that upon the aforesaid facts said have a good cause of action against in an action of trespass on the case, as stated in annexed writ, and claims damages in the sum of dollars.

Subscribed, etc.⁷⁵

.....

BOND

334 Creditors

Know all men by these presents, that we

 of the county of and state of Illinois, are held and firmly bound unto of county and state aforesaid, in the sum of dollars, to be paid to the said executors, administrators or assigns,

⁷⁵ Hatch v. Saunders, 66 Mich. 181, 183 (1887).

for which payment well and truly to be made, we bind ourselves, jointly and severally, and our respective heirs, executors and administrators, firmly by these presents.

Sealed with our seals, and dated this day of, 19..

Whereas, the above bounden has filed in the circuit court of county, and state of Illinois, his certain affidavit for the arrest of the above named

And whereas, honorable, one of the judges of said court, has indorsed an order under his hand on said affidavit, directing the clerk of said court to issue a *capias ad respondendum* for the arrest of the said upon the said giving bond and security as provided by law:

Now, therefore, the condition of the above obligation is such, that if the above bounden shall prosecute the above mentioned *capias* with effect and without delay, and pay, or cause to be paid to the said his heirs, executors, administrators or assigns all such costs and damages that may be sustained by the wrongful suing out of such *capias* then the above obligation to be void; otherwise to be and remain in full force and virtue.

Approved this }
day of, 19.. } (Signatures and seals)
..... Clerk. }

335 Sheriff

Know all men by these presents, that we of the county of, and state of Illinois, are held and firmly bound unto, sheriff of county, in the state of Illinois, in the sum of dollars, lawful money of the United States, for the payment of which sum, well and truly to be made to the said sheriff as aforesaid, or his successors in office, executors, administrators or assigns, we hereby jointly and severally bind ourselves, our heirs, executors and administrators.

Witness our hands and seals, this day of 19..

The condition of this obligation is such, that whereas,.....

 ha lately sued out of the court of county
 a certain writ of *capias ad respondendum*, in a certain plea of
 against

 returnable to the next term of the said court, to be holden at the
 court house, in the city of, in said county, on the
 Monday of next.

Now, if the said
 shall be and appear at the said court, to be holden at
 aforesaid on the said Monday of next;
 and, in case the said
 shall not be received as bail in the said action, shall put in good
 and sufficient bail, which shall be received by the plaintiff, or
 shall be adjudged sufficient by the court, or the said
 being accepted
 as bail, shall pay and satisfy the costs and condemnation money,
 which may be rendered against the said

 in the plea aforesaid, or surrender the bod of the said

 in execution, in case the said
 shall pay and satisfy the said costs and condemnation money,
 or surrender in execution, when, by law, such surrender
 is required, then this obligation to be void; otherwise to remain
 in full force and effect.

(Signatures and seals)

WRIT

336 Service

The service of a writ of *capias ad respondendum* may be by
 arrest and imprisonment until judgment, by arrest and taking
 bail, or by arrest, reading of the writ and release without tak-
 ing bail.⁷⁶

337 Form, Florida

State of Florida,

To all and singular the sheriffs of the state of Florida:

You are hereby commanded to take.....
 if be found in your county, and safely keep,
 so that you have body before the judge of our
 court, for county, at the court house in

⁷⁶ McNab v. Bennett, 66 Ill. 157,
 161 (1872); Sec. 3, Practice act 1907
 (Ill.).

..... forthwith, to answer the state
of Florida for
and have then and there this writ.

Witness the honorable judge of our said
..... court, and the seal of said court, this
day of, 19..

....., Clerk.

338 Form, Illinois

State of Illinois, }
..... county. } ss.

The people of the state of Illinois, to the sheriff of
county, greeting:

Whereas, the honorable, one of the judges
of the circuit court of county, has had presented to
him a certain affidavit to hold to bail and the said
judge having endorsed an order under his hand on said affidavit
directing the clerk to issue a *capias ad respondendum* for the
arrest of said and having fixed the amount of bail
at dollars, and bond and security according to
the act in such case made and provided having been given:

You are therefore commanded, that you take the bod of
.....
if he shall be found in your county and safely
keep so that he be and appear before the circuit court of
..... county, on the day of the term thereof, to
be holden at the court house, in in said
county, on the Monday of, 19..
to answer unto
in a plea of
to the damage of said plaintiff as is said in the sum of
..... dollars cents.

And have you then and there this writ, with an endorsement
thereon in what manner you shall have executed the same.

Witness,, clerk of our said court, and the seal
thereof, at, in said county, this day of
....., 19..

....., Clerk.⁷⁷

(Seal)

Return

Pd. M.
..... 19.., rec'd \$. defendant's board from
..... 19.., to, 19.., inclusive.

Executed this writ by reading the same to and arresting the
body of the within named defendant,, and he giv-

⁷⁷ The writ should bear the fol- the defendant to bail in the sum
lowing endorsement of the clerk of of dollars.
the court: "The sheriff will hold Clerk."

ing bond for his appearance, which is hereto annexed, I have released him from custody this day of, 19..
, Sheriff.
 By, Deputy.

339 Form, Michigan

State of Michigan, } ss.
 County of..... }

The circuit court for the county of.....

To the sheriff of said county, greeting:

In the name of the people of the state of Michigan, you are commanded to take
 if may be found in your bailiwick and
 safely keep so that you may have bod before the circuit
 court for said at the court house, in the
 of on the day of, 19..
 that being the first day of the next succeeding term of our circuit
 court, to answer to the suit of
 plaintiff , against the said
 defendant , in an action of trespass on the case for.....

.....
 which action has been duly commenced in our said court against
 said
 defendant , claiming damages to the amount of
 dollars, all of which shall then and there
 be made to appear, and of this writ make due return.

Witness, the honorable, judge of
 the circuit court for the county of, this
 day of in the year of our Lord one thousand nine
 hundred and

....., Clerk.

.....

Attorney for plaintiff.

State of Michigan, } ss.
 County of..... }

I,, sheriff of the county of, do
 hereby certify and return that I have taken

 within named defendant , whose bod I have ready as
 within I am commanded,

Dated at the day of,
 19..

....., Sheriff.

Fees

Service of <i>capias</i>	\$.....
Traveling fees .....	.....
Disbursements .....	.....
Total fees	\$.....

No.	Circuit court for the	
	county of	
	
	v.	
	
	Capias ad Respondendum	
	with affidavit attached.	
	
	Order to hold to bail.	
	Let the within named	
	defendant., be.... held	
	to bail by the sheriff, in the	
	sum of dollars.	
	Dated at, this	
	..... day of,	
	19..	
	....., Circuit	
	court commissioner.	
	..... county, Mich.	
	..... Filed, 19..	
	..... Clerk.	
	..... Plaintiff's attorney.	

BAIL

340 Arrest, nature

An arrest upon a *capias* is equivalent to service of it as a summons where the defendant is released on common bail.⁷⁸

341 Jurisdictional defects, waiver

Jurisdictional defects in the affidavit are not waived by putting in special bail and pleading in the cause.⁷⁹

342 Bail piece, waiver

Sureties waive the right to have bail pieces delivered to them at the time of giving the bail bond, by failing to call for them.⁸⁰

343 Bond, validity

A bail bond in the name of the under-sheriff will be treated as a bond to the sheriff himself, and is valid.⁸¹

⁷⁸ Wann v. M'Goon, 2 Seam. 74, 77 (1849).

⁷⁹ *In re* Stephenson, 32 Mich. 60, 61 (1875).

⁸⁰ Wileox v. Ismon, 34 Mich. 268, 271 (1876).

⁸¹ Wileox v. Ismon, 34 Mich. 268, 271.

344 Bond, liability

The liability of the bail rests upon the case made by the affidavit, and none other.⁸²

345 Objections

And now come the plaintiffs in the above entitled cause, by, their attorney, and except to the sufficiency of the bail and the bail bond heretofore given by the defendant to the sheriff of county, in order that he, the defendant, might be released from arrest under the *capias ad respondendum* issued in said cause, and for cause of exception say:

1. Said bail bond is not in conformity with the statute in such case made and provided, in that, in the conditions thereof, the word "not" is omitted between the words "shall" and "pay" in the second line from the bottom, before the signatures thereto; which omission relieves the bail from surrendering the body of the defendant in execution in case the defendant should not pay and satisfy the costs and condemnation money, or surrender himself in execution when by law such surrender is required.

2. Said bail is insufficient in that the surety is a person of little or no property beyond the real estate scheduled before said sheriff at the time he took said bond, which said real estate is incumbered for its full value.

3. Said bail and bail bond are in other respects uncertain and insufficient, and afford no security to the plaintiffs in said cause.

.....
Plaintiff's attorneys.

DEFENSES

346 Irregularities

The mere misnaming of an action does not render a writ of *capias* invalid if the form of the action is sufficiently disclosed from the affidavit for the writ.⁸³ The defense that the plaintiff is misnamed in a writ of *capias ad respondendum* must be raised by plea; not by motion.⁸⁴

347 Motion to quash writ

And now comes the said defendant, in his own proper person and by, his attorney, and moves the court to quash the writ of *capias ad respondendum* heretofore issued in this cause, and to discharge the bail bond therein, and that the said

⁸² Fish v. Barbour, 43 Mich. 25.

⁸⁴ Watson v. Watson, 47 Mich.

⁸³ Pease v. Pendell, 57 Mich. 315, 427, 429 (1882).
317 (1885).

writ be ordered to stand as a summons, only. And for cause of said motion the said defendant shows the following: 1. The affidavit of, filed in said cause, and upon which the said *capias ad respondendum* was issued, is irregular, imperfect, informal and insufficient; 2. The facts stated in said affidavit are not true; 3. Said affidavit and proceedings based thereon are, in other respects, informal, uncertain and insufficient.

.....
 Defendant's attorney.

.....
 Defendant.

JUDGMENT

348 Discontinuance

As against the defendant, the failure of the plaintiff to file his declaration within the statutory period works a discontinuance of a suit commenced by *capias*, without the entry of a rule or an order declaring the discontinuance, unless the defendant has waived the objection by pleading and going to trial; but as against the bail the renewal of jurisdiction by waiver is ineffectual, for the defendant has no power to waive the lapsed suit for the bail.⁸⁵

⁸⁵ Fish v. Barbour, *supra*.

PART II
PLEADING AND PRACTICE

CHAPTER XI

RULES OF COURT

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IN GENERAL

349 Power of court, nature

Every court of record has an inherent or a statutory power to prescribe reasonable rules for the regulation of practice before it.¹ The power to prescribe rules for the conduct of the business of a court is judicial in its nature, and not legislative. Thus, the requirement of abbreviated forms of orders, is a judicial act.²

350 Rules, requisites

Rules of practice are like legislative enactments: they must be reasonable; they must be in writing; they must not be retroactive; they must be entered of record for a reasonable time to become known;³ and they must be uniform. A rule of practice which is inconsistent with the general law is void and of no effect.⁴

351 Interpretation

The trial court's interpretation of its own rules of practice will be followed by reviewing courts in the absence of a clear

¹ *Lancaster v. Waukegan & S. W. Ry. Co.*, 132 Ill. 492, 493 (1890); *Sec. 12, c. 37, Hurd's Stat. 1909*, p. 664; *Wallbaum v. Haskin*, 49 Ill. 313, 315 (1868).

² *Chicago v. Coleman*, 254 Ill. 338, 341 (1912).

³ *Owens v. Ranstead*, 22 Ill. 161, 174 (1859); *Illinois C. R. Co. v. Haskins*, 115 Ill. 300, 311 (1885).

⁴ *Fisher v. National Bank*, 73 Ill. 34, 38 (1874).

violation, disregard or misconception of these rules by the *nisi prius* court.⁵ A court which has authority to and does establish rules of court is their best interpreter.⁶

352 Application, discretion

A court has no discretion in the application or in the enforcement of its own rules of practice, except when allowed by the rules themselves.⁷

353 Judicial notice

A reviewing court does not take judicial notice of the rules of practice of the trial court.⁸

COURTS

354 Circuit courts

In Michigan the Circuit court rules are made by the supreme court under statutory authority.⁹

355 County courts

A county court has power, in Illinois, to establish rules of practice for the purpose of facilitating its business.¹⁰

356 Superior court of Detroit

The superior court of Detroit, Michigan, has no power to establish general rules of practice without the approval of the supreme court.¹¹

357 Supreme court, Michigan

In establishing rules of practice for inferior courts, the policy of the supreme court of Michigan is to cover only such matters of practice which have not been touched upon by the legislature. Except as to special and irregular proceedings, the policy

⁵ *Stanton v. Kinsey*, 151 Ill. 301, 306 (1894).

⁶ *Mix v. Chandler*, 44 Ill. 174, 175 (1867); *Ettinghausen v. Marx*, 86 Ill. 475, 476 (1877).

⁷ *Illinois C. R. Co. v. Haskins*, *supra*; *Lancaster v. Waukegan & S. W. Ry. Co.*, *supra*.

⁸ *Greer v. Young*, 120 Ill. 184, 186 (1887).

⁹ *Harper v. Murphy*, 155 Mich. 543, 545 (1909); (205) C. L. 1897 (Mich.).

¹⁰ *Holloway v. Freeman*, 22 Ill. 198, 202 (1859).

¹¹ *Wyandotte Rolling Mills Co. v. Robinson*, 34 Mich. 428, 436 (1876).

of Michigan is to secure uniformity in substantial matters of practice in all tribunals of the same class; and in order to carry out this policy, the supreme court alone has been given the power to establish, modify or amend general rules of practice. But this does not prevent a court of record from ordaining suitable rules upon matters of practice which have not been regulated by the legislature or the supreme court.¹²

¹² Wyandotte Rolling Mills Co. v. Robinson, *supra*.

CHAPTER XII

PLEADING IN GENERAL

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LAW GOVERNING

358 Generally

The law of the state where a remedy is sought controls the mode and the form of procedure,¹ and the statute in force when a cause is tried controls, and not the statute when the action is commenced.² A vested right is not interfered with by changing an existing remedy.³

359 Illinois

The common law system of pleading prevails in Illinois, except as it has been modified by statutes which have removed the arbitrary and artificial distinctions of the old system of pleading, but left unchanged the general logical arrangement, the order, the structure and the forms of pleadings.⁴ By the adoption of the common law, neither the local customs of England, nor the ancient common law practice are included.⁵ All statutes concerning the jurisdiction, the powers, the proceedings and the practice of courts of the same class or grade must be of general and uniform operation.⁶

RULES OF PLEADING

360 Rules of pleading defined

The ordinary rules of pleading are mere modes prescribed or permitted by the courts for the purpose of bringing before them all of the facts or truths which ought to be considered in determining the ultimate rights of parties.⁷

361 Nature and scope

Rules of proceedings are adopted to expedite the business of courts, to secure certainty, accuracy, order and uniformity, in the disposition of public justice.⁸

¹ *Collins v. Manville*, 170 Ill. 614, 617 (1897); *Smith v. Whitaker*, 23 Ill. 367 (1860).

² *Murphy v. Williamson*, 85 Ill. 149, 151 (1877).

³ *Monger v. New Era Ass'n.*, 156 Mich. 645, 651 (1909).

⁴ *Pitts Sons' Mfg. Co. v. Commercial Nat. Bank*, 121 Ill. 582, 586 (1887); *Bailey v. Valley National Bank*, 127 Ill. 332, 338 (1889).

⁵ *Hannibal & St. J. R. Co. v.*

Crane, 102 Ill. 249, 258 (1882); *Schroeder v. Merchants & Mechanics' Ins. Co.*, 104 Ill. 71, 77 (1882).

⁶ *People v. Cosmopolitan Fire Ins. Co.*, 246 Ill. 442, 446 (1910); Sec. 29, art. 6, Const. 1870 (*Hurd's Stat.* 1909, p. 67).

⁷ *Cox v. Jordan*, 86 Ill. 560, 566 (1877).

⁸ *Wisconsin C. R. Co. v. Wieczorek*, 151 Ill. 579, 586 (1894).

362 Application

Well settled rules of proceeding should not be disregarded where their applicability is plain and unquestionable.⁹ When once established, rules of pleading and practice should be followed in all like cases.¹⁰

363 Changing rules

Courts have power to prescribe or permit new modes of pleading wherever the application of the ordinary rules of pleading and practice would produce injustice.¹¹

PRINCIPLES

364 Importance of principles

The general principles of pleading may be more safely resorted to than isolated decisions of courts.¹²

365 Object of pleading

The object of pleading is to produce a single issue upon some subject matter in dispute.¹³

366 Burden of proof

It is not necessary to prove more than a party is required to allege.¹⁴ Nor is it necessary to prove an immaterial averment.¹⁵ Whatever one of the parties must prove under his pleadings, the other may disprove.¹⁶ The party who holds the affirmative of an issue has the burden of proving it by a preponderance of evidence.¹⁷ A criminal charge made in a pleading of a civil suit must be proved beyond a reasonable doubt.¹⁸ The proof and the allegations must correspond.¹⁹ Every allegation which is descriptive of the cause of action must be proved

⁹ *Wisconsin C. R. Co. v. Wieczorek*, *supra*.

¹⁰ *Cox v. Jordan*, 86 Ill. 566.

¹¹ *Cox v. Jordan*, *supra*.

¹² *Ross v. Nesbit*, 2 Gilm. 252, 257 (1845).

¹³ *Noetling v. Wright*, 72 Ill. 390, 392 (1874).

¹⁴ *Richards v. Jerseyville*, 214 Ill. 67, 69 (1905).

¹⁵ *Chicago & Alton R. Co. v. Vipond*, 212 Ill. 199, 202 (1904).

¹⁶ *Chandler v. Lincoln*, 52 Ill. 74, 76 (1869).

¹⁷ *Mitchell v. Deeds*, 49 Ill. 420.

¹⁸ *McInturff v. Insurance Co. of N. A.*, 248 Ill. 92, 99 (1910).

¹⁹ *Chicago City Ry. Co. v. Bruley*, 215 Ill. 464, 465 (1905).

as alleged in the pleading.²⁰ An objection on account of variance between the allegation and proof must be made at the earliest possible moment, when the variance first appears, as it is waived if not so made.²¹ By procuring an instruction which directs a verdict on the law applicable to the state of facts that is disclosed by the evidence, a party waives his right to object that the facts proved are not within the allegations of the pleadings.²²

367 *Prima facie* case or defense

A pleader is required to make out only a *prima facie* case or defense;²³ and in presenting his side, he is not called upon to state matters which come more properly from the opposite side or which are within the adversary's own knowledge. The stating of a general right is sufficient without showing the existence of an exception thereto raised by law. As a general rule, a matter should not be omitted if it is so connected with a party's case or defense that its affirmation or denial is essential to the validity of the pleading, when taken in connection with all prior pleadings upon the record.²⁴

368 Averments, nature of

The averments of a party's cause of action or defense must be stated truly.²⁵

369 Averments, facts and conclusions

Facts and not conclusions must be alleged in a pleading.²⁶ In alleging facts, the ultimate facts alone should be averred.²⁷

370 Argumentative

A pleading must not be argumentative.²⁸

²⁰ *Wabash R. Co. v. Billings*, 212 Ill. 37, 39 (1904).

²¹ *Chicago v. Bork*, 227 Ill. 60, 63 (1907); *Wabash Ry. Co. v. Billings*, *supra*.

²² *Donk Bros. Coal & Coke Co. v. Stroetter*, 229 Ill. 134, 138 (1907).

²³ *People v. Heidelberg Garden Co.*, 233 Ill. 290, 296 (1908); 1 *Chitty's Pl.*, 12th Am. ed., p. 222.

²⁴ *Ibid.*, 222, 224.

²⁵ *Read v. Walker*, 52 Ill. 333, 335 (1869).

²⁶ *Fortune v. English*, 226 Ill. 262, 268 (1907); *Waterbury Nat. Bank v. Reed*, 231 Ill. 246, 250 (1907); *Lefkovitz v. Chicago*, 238 Ill. 23, 30 (1909).

²⁷ *Chicago & Eastern I. R. Co. v. Kimmel*, 221 Ill. 547, 551 (1906).

²⁸ *Distilling & Cattle Feeding Co. v. People*, 156 Ill. 448, 483 (1895).

371 Certainty

The cause of action or ground of defense must be clearly and distinctly stated so that it might be understood by the opposite party, judge, and jury.²⁹ An averment which is certain to a common intent is sufficient.³⁰

372 Cumulative

Pleadings which contain literally or in legal effect the same matter as do similar pleadings in the case of the same party will be stricken out; but before striking out the cumulative pleading a court may, in its discretion, require an election to be made on which pleading the party desires to proceed.³¹

373 Departure

The allegations of the pleader must be consistent with each other. Thus, the replication must support the declaration; the rejoinder, the plea. No direct affirmative or denial of a triable issue can be attained in any other way.³²

374 Duplicity

The setting up of two or more distinct and sufficient causes of action or defenses, either of which, if true, would necessitate a finding for the pleader, constitutes duplicity in a pleading.³³ But, a pleading will not be regarded as double, when it necessarily includes statutory elements; as where the statute requires certain distinct jurisdictional grounds to be negatived in a plea of abatement.³⁴ A pleading is not double by alleging mere surplusage or facts as inducement;³⁵ nor does an immaterial averment render the pleading double.³⁶ So a count is not double which merely joins several causes of action of the same nature.³⁷

²⁹ *Chicago City Ry. Co. v. Jennings*, 157 Ill. 274, 277 (1895); *Ohio & Mississippi Ry. Co. v. People*, 149 Ill. 663, 666 (1894); *De Forrest v. Oder*, 42 Ill. 500, 502 (1867).

³⁰ *Eddy v. Courtright*, 91 Mich. 264, 269 (1892).

³¹ *People v. Central Union Tel. Co.*, 192 Ill. 307, 309 (1901); *Parks v. Holmes*, 22 Ill. 522, 525 (1859).

³² *Wiard v. Semken*, 8 Mackey 479 (D. C. 1891).

³³ *Deatrick v. State Life Ins. Co.*,

107 Va. 602, 610 (1907); *Wilson v. Gilbert*, 161 Ill. 49, 52 (1896); *State v. Commercial Bank*, 33 Miss. 474, 496 (1857).

³⁴ *Deatrick v. State Life Ins. Co.*, *supra*.

³⁵ *State v. Commercial Bank*, 33 Miss. 496.

³⁶ *Lusk v. Cook, Breese*, 84, 85 (1824).

³⁷ *Godfrey v. Buckmaster*, 1 Seam. 447, 450 (1838).

375 Evidence

It is not permissible to plead evidence and immaterial matter, as it is difficult from this kind of a pleading to ascertain what portions are material and what portions are immaterial, and to give it proper consideration.³⁸ A pleading should not aver circumstances which merely tend to prove the truth of the facts stated; it should solely confine itself to the statement or allegation of fact.³⁹ Enough of the facts to be relied upon as sustaining the cause of action or defense must be alleged to enable the court to determine their sufficiency.⁴⁰ The rule that every fact which is necessary to be proved should be averred means that the proof must find its foundation in the pleading, but not that every distinct fact must be pleaded.⁴¹ Nor is it necessary to so plead as to foreshadow the evidence in detail to be produced in support of the pleading.⁴²

376 Particularity

Particularity in the averment of time, place, number, person and amount is required where it is essential to the right of recovery or defense, or where a general averment would put the opposite party at a disadvantage; and this particularity is dispensed with whenever it leads to prolixity.⁴³ A distinct averment of time is necessary to every material fact, except where the transaction has run through a long space of time, or there have been repeated wrongful acts; in which event, it is sufficient to allege that the transaction or the acts took place between specified dates.⁴⁴ The mere statement of amounts in a pleading is not binding unless it is supported by a traversable averment.⁴⁵

377 Traverse, nature and scope

A traverse is a specific denial of material matter in issue and is either common, general, or special. It refers to pleas, replications and subsequent pleadings.

³⁸ *People v. Payson*, 210 Ill. 82, 83 (1904).

³⁹ *Campbell v. Hudson*, 106 Mich. 523, 526 (1895); *People v. Pavey*, 151 Ill. 101, 105 (1894).

⁴⁰ *Willard v. Zehr*, 215 Ill. 148, 157 (1905).

⁴¹ *Rae v. Hulbert*, 17 Ill. 572, 578 (1856).

⁴² *Griffing Bros. Co. v. Winfield*, 53 Fla. 589 (1907).

⁴³ *Kipp v. Bell*, 86 Ill. 577, 580, (1877).

⁴⁴ *Read v. Walker*, 52 Ill. 333, 334 (1869).

⁴⁵ *Lindley v. Miller*, 67 Ill. 244, 248, 249 (1873).

378 Traverse, special

The essential parts of a special traverse are the inducement, the denial and the verification, the only issuable part being the denial under the *absque hoc*. No issue of fact can be formed upon the inducement when the denial under the *absque hoc* is sufficient.⁴⁶

379 Traverse, special and common distinguished

A special traverse differs from a common traverse in that the special traverse explains or qualifies the denial.⁴⁷

380 Traverse, requisites

A traverse should always be upon some affirmative matter. A negative allegation cannot be traversed; nor can one negative averment be traversed by another negative.⁴⁸

381 Traverse, admission

All traversable allegations made by the opposite party are confessed if not traversed. This rule has no application to a dilatory plea, to a new assignment, nor to a plea in estoppel.⁴⁹

SPECIAL MATTER

382 Aggravation, new assignment

In an action of tort for an original wrong and for subsequent consequences which are alleged as matters of aggravation, the defendant is not required in the first instance, to answer the matters of aggravation without a new assignment by the plaintiff, but must make a complete answer to the original wrongful act; upon the defendant pleading to the original wrongful act, the plaintiff, if he desires to take advantage of the matters of aggravation, must new assign for them.⁵⁰

383 Demand

In all cases in which it is necessary to make a demand before instituting suit, the making of a special request or demand must be alleged and proved.⁵¹

⁴⁶ *People v. Central Union Tel. Co.*, 192 Ill. 307, 312 (1901).

⁴⁷ *People v. Central Union Tel. Co.*, *supra*.

⁴⁸ *Ryan v. Vanlandingham*, 25 Ill. 128 (1860).

⁴⁹ *Dana v. Bryant*, 1 Gilm. 104,

108 (1844); *People v. Crabb*, 156 Ill. 155, 165 (1895).

⁵⁰ *McConnel v. Kibbe*, 33 Ill. 180 (1864).

⁵¹ *Minor v. Michie, Walker* 24, 29 (Miss. 1818).

384 Discharge and justification

In actions of tort, matters in discharge or in justification of the action, must be specially pleaded.⁵²

385 Forfeiture

Every material fact which is necessary to constitute a forfeiture must be alleged.⁵³

386 Foreign laws

The law of another state must be pleaded and proved the same as any other fact, before the full faith and credit clause of the Federal constitution can be invoked.⁵⁴

387 Notice

A general allegation that a "reasonable notice," was given is objectionable when notice is necessary. The averment of notice must show that it was given in due time and to the proper person.⁵⁵

388 Ordinance, judicial notice

A municipal ordinance must be specially pleaded the same as any other matter or fact. Courts do not take judicial notice of ordinances.⁵⁶

389 Statutes, exceptions and exemptions

Ordinarily, a pleading is sufficient which relies upon a general provision of a statute, and unless affirmatively shown, it is presumed that there are no exceptions to the statute.⁵⁷ A pleading which is based upon a statute containing an exception must negative the exception when it is part of the cause of action or defense, but not otherwise.⁵⁸ An exception to a statute excludes in express terms the thing excepted, leaving the

⁵² *Olsen v. Upsahl*, 69 Ill. 273, 277 (1873); *Illinois Steel Co. v. Novak*, 184 Ill. 501, 502 (1900); *Hahn v. Ritter*, 12 Ill. 80, 83 (1850).

⁵³ *Illinois Fire Ins. Co. v. Stanton*, 57 Ill. 354, 358 (1870).

⁵⁴ *Lenthe v. Thomas*, 218 Ill. 246, 253 (1905); *Smith v. Whitaker*, *supra*.

⁵⁵ *McCormick v. Tate*, 20 Ill. 334, 337 (1858).

⁵⁶ *People v. Busse*, 248 Ill. 11, 16 (1910).

⁵⁷ *Armstrong v. Wilcox*, 57 Fla. 30, 34 (1909).

⁵⁸ *Whitecraft v. Vanderver*, 12 Ill. 235, 238 (1850).

statute as before. A proviso in a statute only exempts the thing within the statute from its operation under certain circumstances, or under certain conditions.⁵⁹ The thing exempted from the operation of a statute is the exemption. No special or technical words are necessary to create an exception, proviso, or exemption. An exception is part of the cause of action or defense, if it is mentioned in the enacting clause of the statute upon which the action or defense is based.⁶⁰ The exception is also part of the action or defense when it is not a separate and distinct clause, but it is incorporated in the general clause of the statute conferring the right of action or defense.⁶¹ If a statute contains two or more exceptions, but one only of which is covered by the enacting clause, that one alone must be negatived in the pleading; the other or others are matters which have to be set up by the opposite party.⁶² An exemption in a proviso to the enacting clause, or in a subsequent section of a statute, is matter of defense to be alleged by the opposite party.⁶³ A party who relies upon an exception to a general statute which the opponent is not bound to set forth as part of his case, must clearly bring himself within the exception;⁶⁴ and this is a rule of evidence as well as one of pleading.⁶⁵

390 Statutes, validity, waiver

The question of the validity of an ordinance, statute, or constitutional provision is waived, unless raised by the pleadings and presented by instructions or by propositions of law and the right is insisted upon in the trial court.⁶⁶

CONSTRUCTION OF PLEADING

391 Presumption

A pleading will be construed most strongly against the pleader.⁶⁷

⁵⁹ *Myers v. Carr*, 12 Mich. 63, 71 (1863).

⁶⁰ 1 Chitty's Pl., 12th Am. ed., p. 223; *Chicago, B. & Q. R. Co. v. Carter*, 20 Ill. 390, 392 (1858); *Hyman v. Bayne*, 83 Ill. 256, 264 (1876); *Myers v. Carr*, *supra*.

⁶¹ *Whitecraft v. Vanderver*, *supra*.

⁶² 1 Chitty's Pl., p. 223; *Great W. R. Co. v. Hanks*, 36 Ill. 281, 284 (1865); *Toledo, Peoria & Warsaw*

Ry. Co. v. Lavery, 71 Ill. 522, 523 (1874).

⁶³ *Myers v. Carr*, *supra*.

⁶⁴ *Wood v. Williams*, 142 Ill. 269, 280 (1892); *Armstrong v. Wilcox*, 57 Fla. 34.

⁶⁵ *Osborn v. Lovell*, 36 Mich. 246, 249 (1877).

⁶⁶ *People v. Harrison*, 223 Ill. 540, 545 (1906).

⁶⁷ *Consolidated Coal Co. v. Peers*,

392 Admissions

A party is bound by the admissions made in his own pleadings, whether the admissions are expressly made, or they are raised from necessary implication.⁶⁸

393 Doubtful meaning

The meaning that is most unfavorable to the pleader will be adopted where an equivocal allegation is susceptible of two meanings.⁶⁹

394 Defects

Defects in pleading are aided by the pleadings of the opposite party, or they are cured by the statute of Amendments and Jeofails, or by intendment after pleading.⁷⁰ The statute of Amendments and Jeofails does not extend to the curing of defects which are clearly matters of substance.⁷¹ At common law, a verdict cures any defect, imperfection or omission in pleading, whether of substance or form, which would have been a fatal objection upon demurrer, if the issue joined was such that necessarily required on the trial proof of facts so defectively or imperfectly stated or omitted, and without which neither judge nor jury could have given the verdict or judgment.⁷² Too general averments in pleadings are cured after verdict.⁷³

395 Irregularity and nullity, waiver

An irregularity is the omission to do something which is necessary in the due and orderly conduct of a legal proceeding, or the doing of something necessary in a proceeding in an unreasonable time or an improper manner, but which is capable of waiver by the party affected by it.⁷⁴ A nullity is a proceeding which is taken without any foundation for it, or which is essentially defective or made so by statute and is incapable of

166 Ill. 361, 372 (1897); *Fortune v. English*, 226 Ill. 269; *People v. Rose*, 254 Ill. 332, 334 (1912); *People v. Union Gas & Electric Co.*, 254 Ill. 395, 414 (1912).

⁶⁸ *State v. Commercial Bank*, 33 Miss. 495.

⁶⁹ *Halligan v. Chicago & R. I. R. Co.* 15 Ill. 558, 560 (1854).

⁷⁰ *Chicago & Alton R. Co. v. Clausen*, 173 Ill. 100, 103 (1898).

⁷¹ *Chicago & Alton R. Co. v. Clausen*, *supra*.

⁷² *Chicago & Alton R. Co. v. Clausen*, *supra*; *Illinois Terra Cotta Lumber Co. v. Hanley*, 214 Ill. 243 (1905).

⁷³ *Brunhild v. Chicago Union Traction Co.*, 239 Ill. 621, 623 (1909).

⁷⁴ *Turrill v. Walker*, 4 Mich. 177, 183 (1856).

waiver.⁷⁵ Without an opportunity to waive a right, there can be no waiver.⁷⁶

396 Surplusage

Any averment which amounts to mere surplusage may be entirely disregarded with reference to forming an issue upon it or in producing evidence to substantiate it.⁷⁷

397 Words and phrases, craftily

The words "craftily," "fraudulently," "falsely," and "maliciously," are of no avail in the absence of averments of fact to which they properly apply.⁷⁸

398 Words and phrases, petition

A petition is common to law and chancery.⁷⁹

PRACTICE

399 Order of pleading

The usual and regular order of common law pleading is as follows: on behalf of the plaintiff, the declaration, the replication, or new assignment, the surrejoinder and surrebutter; on behalf of the defendant, the plea, the rejoinder, the rebutter, and *puis darrein* continuance. The irregular pleadings are demurrers, bills of exception, *scire facias*, pleas in error.⁸⁰ It is customary, in Mississippi, to read the pleadings to a jury as the opening statement of the case or defense. It is, therefore, the practice of a good pleader to draw his pleadings so that they can be read to, and readily understood by the jury.

400 Negligence

A court will not restore a party to a legal right which he has lost through his own negligence.⁸¹

⁷⁵ *Jenness v. Lapeer* Circuit Judge, 42 Mich. 469, 471 (1880).

⁷⁶ *Munn v. Haynes*, 46 Mich. 140, 145 (1881).

⁷⁷ *Pennsylvania Co. v. Conlan*, 101 Ill. 93, 102, 103 (1881).

⁷⁸ *Fortune v. English*, 226 Ill. 269.

⁷⁹ *Standidge v. Chicago Rys. Co.*, 254 Ill. 524, 531 (1912).

⁸⁰ 1 Chitty's Pl., p. 239.

⁸¹ *Chicago, P. & S. W. R. Co. v. Marseilles*, 107 Ill. 313, 316 (1883).

401 Demurring and pleading

At common law a party is not permitted to demur and to plead to the same matter, either at the same or at different times, and thereby to present two distinct issues at one and the same time.⁸²

402 Expiration of time; leave of court

Without special leave of court, a party has no right to plead after the expiration of the time to plead, and neither the opposite party nor the court need recognize a paper which is placed among the files of a case without such leave.⁸³

403 Precedents, use of

It is not necessary to use the precise words employed in an approved precedent. It is sufficient to use other equivalent words conveying precisely the same meaning.⁸⁴

404 Filing, fees

A party who has an instrument to file in an office and presents it to the proper officer has the benefit and advantage of the act as though the document had been formally filed, and the failure to advance and tender the fee, when not demanded, does not deprive him of this benefit.⁸⁵

405 Rejecting pleading, motion, Maryland

⁸⁶ now comes into this court and asks the court not to receive the paper purporting to be a (replication) to the answer of said this day of 19.., brought into this court by long after hearing by this court of the case submitted by said on his petition and the answer of said, and that said paper be not accepted by this court or recognized as a part of the proceedings in the said cause.

.....
Solicitor for

⁸² Edbrooke v. Cooper, 79 Ill. 582, 583 (1875).

⁸³ Walter Cabinet Co. v. Russell, 250 Ill. 416, 419 (1911).

⁸⁴ Miller v. Blow, 68 Ill. 304, 309 (1873); Read v. Walker, 52 Ill. 334.

⁸⁵ Dowie v. Chicago, Waukegan & North Shore Ry. Co., 214 Ill. 49, 54 (1905).

⁸⁶ See Section 211, Note 60.

Order

Upon reading and considering the motion of filed on the day of, 19.., asking the court not to accept the replication of filed on the same day, after the hearing of the motion of said filed on the day of, 19.., to dismiss the petition of said filed on the day of, 19.., it is ordered by the court of county, this day of, 19.., that the said (replication) be not accepted and the same is hereby rejected.

406 Striking pleading from files

A pleading which contains evidence and immaterial matter will be stricken from the files upon motion, and the pleader will be ruled to replead.⁸⁷

407 Withdrawing pleadings, discretion

Neither the plaintiff nor the defendant has an absolute right to withdraw his pleadings, but the trial court may, in its discretion, permit the withdrawal of a pleading.⁸⁸ Under the liberal Florida statute of amendments, a trial court has ample power to permit the withdrawing of pleadings and to grant leave to file new pleadings.⁸⁹

408 Withdrawing pleadings, petition, Maryland

To the honorable, the judge of said court:

The petition of, the defendant in the above entitled case, respectfully shows unto your honor:

1. That the above case was instituted in this court by the plaintiff on the day of, in the year 19.., to recover certain taxes alleged to be due to the plaintiff by the defendant.

2. That the case was brought to the rule day in the year 19.., and the defendant duly appeared by its attorneys, and on, 19.., filed two pleas to the declaration, to wit, the general issue pleas that it never was indebted as alleged, and that it did not promise as alleged; on which pleas issue was joined by the plaintiff.

3. That defendant now wishes to withdraw said general issue

⁸⁷ *People v. Payson*, 210 Ill. 82 (1865); *Ayres v. Kelley*, 11 Ill. 17 (1904).

⁸⁸ *New England F. & M. Ins. Co. v. Wetmore*, 32 Ill. 221, 251 (1863); *Miles v. Danforth*, 37 Ill. 156, 163 (1849), overruled.

⁸⁹ *Hartford Fire Ins. Co. v. Redding*, 47 Fla. 228, 245 (1904).

pleas, and to plead anew by filing special pleas to the declaration and each and every count thereof, and prays leave of the court so to do.

Wherefore, the defendant prays the court to pass an order granting it leave to withdraw its pleas heretofore filed in this case, and to file anew special pleas to the declaration and to each and every count thereof.

As in duty, etc.

.....

Attorneys for defendant.

The plaintiff consents to the passage of the order as prayed for.

.....

Attorney for plaintiff.

Order

On the foregoing petition and consent, it is hereby ordered this day of, in the year 19.., by the court of that leave be, and is hereby granted to the defendant to withdraw the general issue pleas heretofore filed by it in this case, and to plead anew by filing special pleas to the declaration and to each and every count thereof.

.....

Judge of the court of

409 Jury room, removal of pleadings to

Upon the request of either party in a civil action, the pleadings may be sent to the jury room upon the jury's retirement.⁹⁰ But the practice is not commendable. Sending the pleadings to the jury room is not, however, reversible error. Pleadings to which demurrers have been sustained should not be permitted to be taken to the jury room.⁹¹

⁹⁰ East Dubuque v. Burhyte, 173 Ill. 553, 556 (1898); Hanchett v. Haas, 219 Ill. 546, 548 (1906).

⁹¹ Elgin, Aurora & Southern Traction Co. v. Wilson, 217 Ill. 47, 56 (1905).

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IN GENERAL

410 Declaration defined

A declaration is a written statement of the plaintiff's cause of action to apprise the defendant of the precise nature of that cause and to limit the plaintiff's proof thereunder.¹

411 Allegation and proof

Every material fact which is relied upon for a recovery must be averred in a declaration, as no proof is admissible without an averment of an essential fact.² Allegations of a declaration which are descriptive of what is material, although unnecessary, must be proved as stated, unless the variance is waived by the defendant or it is cured by amendment.³ A plaintiff is not required to plead his evidence.⁴

412 Consistency

A pleader will not be permitted to occupy inconsistent positions with respect to the same matter at the same time. If he relies upon the validity of an ordinance, it is inconsistent for him to insist that the ordinance is illegal and void for all other purposes.⁵

413 Duplicity

Duplicity in a declaration is the joining in one count of different grounds of action of different natures, or of the same

¹ Cook v. Scott, 1 Gilm. 333, 340 (1844).

² Toledo, W. & W. Ry. Co. v. Beggs, 85 Ill. 80, 83 (1877).

³ Wabash R. Co. v. Billings, 212 Ill. 37 (1904); Chicago Union Traction Co. v. Hampe, 228 Ill. 346, 350

(1907); Hatley v. Kiser, 253 Ill. 288, 290, 292 (1912).

⁴ American Car & Foundry Co. v. Hill, 226 Ill. 227, 234 (1907).

⁵ McEniry v. Tri-City Ry. Co., 254 Ill. 99, 103 (1912).

nature, to enforce a single right of recovery.⁶ Mere matters of inducement do not amount to duplicity.⁷

414 Variance, waiver

A declaration must pursue the writ in regard to the Christian and surnames of the parties; the names must be at least the same in sound.⁸ A party will not be permitted to set out one cause of action in his declaration and to prove an entirely different cause of action.⁹ Variance between the declaration and the proof is waived, unless objected to in time to afford an opportunity to amend the declaration.¹⁰

REQUISITES

415 Declaration, title

Although a declaration is in the nature of process, it is not process within the meaning of the constitutional provision requiring the entitling of process in a certain manner; and neither the declaration nor the rule to plead, in suits commenced by declaration, have to be entitled "In the name of the people."¹¹

416 Parties, minors, generally

When plaintiffs are minors the declaration should state that they appear by guardian or next friend; but the omission to thus state their character is cured by verdict.¹²

417 Parties, minors, next friend, authority to use name as

¹³ To the honorable, the judge of said court:

I hereby authorize and direct the use of my name in this suit, as the next friend of

.....

⁶ Henry v. Heldmaier, 226 Ill. 152, 155 (1907); Chicago West Division Ry. Co. v. Ingraham, 131 Ill. 659, 665 (1890).

⁷ Watson v. Watson, 49 Mich. 540, 542 (1883).

⁸ Schoonhoven v. Gott, 20 Ill. 46, 47 (1858).

⁹ Republic Iron & Steel Co. v. Lee, 227 Ill. 246, 257 (1907).

¹⁰ Linquist v. Hodges, 248 Ill. 491, 497 (1911).

¹¹ Penfold v. Slyfield, 110 Mich. 343, 345 (1896).

¹² Helmuth v. Bell, 150 Ill. 263, 266 (1894).

¹³ See Section 211, Note 60.

418 Parties, receivers

In an action against a receiver, the declaration must show the obtaining of leave of the court in which the receiver was appointed, to bring the action.¹⁴ The declaration should also describe the defendant as receiver, and not merely receiver.¹⁵

419 Form of action

A declaration should follow the writ upon the character or form of the action and the extent of the demand.¹⁶

420 Venue

It is proper practice to set forth truly the place where the contract was entered into or the liability incurred and to aver under a *videlicet* that such place is within the county wherein the suit is pending; but this allegation is not traversable if untrue in point of fact, because by a fiction of law all transitory actions are supposed to arise in the county where the action is brought.¹⁷ In transitory actions, the venue is sufficiently alleged by giving the county alone.¹⁸ The want of venue in a declaration is not fatal if the cause is tried in the proper county.¹⁹

421 Jurisdiction

Unless questioned by plea in abatement, a declaration is good where only a portion of the cause of action set forth is within the jurisdiction of the court.²⁰ In transitory actions, where summons has been or is to be issued to a foreign county, it is not necessary to aver in the declaration that the plaintiff resides in the county in which the action has been commenced, and that the cause of action has accrued in such county.²¹

¹⁴ *St. Louis, A. & S. R. Co. v. Hamilton*, 158 Ill. 366, 369 (1895).

¹⁵ *Wilcke v. Henrotin*, 241 Ill. 169, 174 (1909).

¹⁶ *Weld v. Hubbard*, 11 Ill. 573, 575 (1850).

¹⁷ *Kenney v. Greer*, 13 Ill. 432, 447, 448 (1851).

¹⁸ *Read v. Walker*, 52 Ill. 333, 335 (1869).

¹⁹ *Grand Rapids & I. R. Co. v. Southwick*, 30 Mich. 444, 446

(1874); (10272), C. L. 1897, subdn. 11 (Mich.).

²⁰ *Diblee v. Davison*, 25 Ill. 486 (1961).

²¹ *Kenney v. Greer*, *supra*; *Gillian v. Gray*, 14 Ill. 416 (1853); *Waterman v. Tuttle*, 18 Ill. 292, 293 (1857); *Key v. Collins*, 1 Scam. 403, 404 (1837), overruled; *Clark v. Clark*, 1 Gilm. 33, 34 (1844), overruled; *Semple v. Anderson*, 4 Gilm. 546 (1847), overruled.

422 Cause of action, generally

A plaintiff must show a complete cause of action at the time he brings suit, and not afterwards.²² The declaration must allege all of the circumstances that are necessary for the support of the action. A declaration which fails to allege a fact without which the plaintiff is not entitled to recover, does not state a cause of action.²³ The beginning of a suit does not stop the running of the statute of limitations, unless the declaration, or some count therein, states a good cause of action.²⁴ Likewise a declaration which omits an essential element of a cause of action will not arrest the running of the statute of limitations.²⁵ The mere restatement of a cause of action with greater particularity is not the stating of a new cause of action justifying a plea of the statute of limitations.²⁶ A declaration must not set up facts in avoidance of the statute of limitations; as a declaration thus framed tenders a double issue.²⁷

423 Cause of action; conditions, performance

If any act is to be done by the plaintiff before the accruing of the defendant's liability, the performance of that act must be averred.²⁸ In actions *ex contractu*, a total denial of liability, or refusal to perform on other grounds, waives a party's right to insist upon performance of conditions precedent to the payment of money or other performance on his part.²⁹ Performance or its equivalent, or a legal excuse for non-performance, must be averred and proved in actions upon an entire express contract, but not in actions upon several contracts embracing independent obligations, nor in an action upon an implied agreement arising from an entire or severable contract which was partially performed and part performance of which was voluntarily accepted by the other party with knowledge of the breach.³⁰

424 Cause of action, estoppel in pais

Matters arising from an estoppel *in pais* are no part of the

²² Hovey v. Sebring, 24 Mich. 232, 234 (1872).

²³ Walters v. Ottawa, 240 Ill. 259, 264 (1909).

²⁴ Walters v. Ottawa, *supra*.

²⁵ Bahr v. National Safe Deposit Co., 234 Ill. 101, 104 (1908).

²⁶ Hagen v. Schleuter, 236 Ill. 467, 470, 471 (1908).

²⁷ Gunton v. Hughes, 181 Ill. 132, 135 (1899).

²⁸ Walters v. Ottawa, *supra*.

²⁹ Lohr Bottling Co. v. Ferguson, 223 Ill. 88, 93 (1906).

³⁰ Harber Bros. Co. v. Moffat Cycle Co., 151 Ill. 84 (1894).

cause of action and need not be specially alleged or pleaded at law.³¹

425 Cause of action, incorporation, proof

In ordinary actions, an averment that the plaintiff is a corporation is sustained by proof that it is exercising corporate rights and privileges.³²

426 Cause of action, interest

Interest upon an indebtedness is not recoverable without either an averment of a demand or the statement of facts which would justify the allowance of interest before the commencement of the suit.³³

427 Cause of action, negating defense, surplusage

At law, as distinguished from equity, a plaintiff is not required to negative a defense in his declaration. All that the plaintiff must do is to state his cause of action or complaint. Anything stated by him in anticipation of a possible defense is regarded as surplusage; and generally, cannot be taken advantage of by demurrer.³⁴

428 Cause of action, penalty

In cases where the parties agree upon a penalty as the measure of damages it is not necessary that the declaration should specially declare for the penalty, because such a penalty is an incident to and follows the principal in the same manner as does interest. But in regard to contracts upon conditions and cases in which the law imposes a penalty, such penalty must be claimed specifically in the declaration to authorize its recovery.³⁵

429 Conclusion, waiver

The conclusion of a declaration is not a substantive fact; it is traversable as a proposition of law alone, and it is waived by

³¹ *Dean v. Crall*, 98 Mich. 591, 594 (1894).

³² *Mitchell v. Deeds*, 49 Ill. 416, 422 (1867).

³³ *Whittemore v. People*, 227 Ill. 453, 475 (1907).

³⁴ *Leshner v. United States Fidelity & Guaranty Co.*, 239 Ill. 502, 508 (1909).

³⁵ *Smith v. Whitaker*, 23 Ill. 312 (1860).

pleading instead of demurring.³⁶ The averment that an act was done contrary to the form of the statute, etc., is essential in, and is confined to actions, upon penal statutes.³⁷ But, in an action upon a remedial statute, it is not necessary that the declaration should conclude against the form of the statute.³⁸

430 *Ad damnum*, practice

The amount laid in the declaration limits the plaintiff's recovery.³⁹ The *ad damnum* should appear at the end of the declaration and not at the close of each count.⁴⁰

431 Signatures

A declaration signed by the surnames of a partnership of attorneys, omitting their proper names, is sufficient.⁴¹

JOINDER AND MISJOINDER OF COUNTS

432 Several counts of same cause of action

The same cause of action may be stated in several counts of the declaration to meet the varying phases of the evidence,⁴² and to prevent possible variance between the declaration and proof.⁴³ This practice is not commendable, as it tends to cumber the record and to add unnecessary costs. The mere resorting to different counts to cover different years for the statement of a single cause of action, does not set up different causes of action.⁴⁴ In stating what is really the same cause of action in different counts, each count must set forth, by apt reference or otherwise, a distinct and complete cause of action.⁴⁵

433 Joinder of counts of different causes of actions

At common law several causes of action of the same nature, whether accruing at the same or different times, may be joined

³⁶ *Winchester v. Rounds*, 55 Ill. 451, 454 (1870).

³⁷ *Sanford v. Gaddis*, 13 Ill. 329, 340 (1851).

³⁸ *Mount v. Hunter*, 58 Ill. 246, 248 (1871).

³⁹ *Thompson v. Turner*, 22 Ill. 389, 390 (1859).

⁴⁰ *Lake Erie & W. R. Co. v. Wills*, 140 Ill. 614, 619 (1892).

⁴¹ *Zimmerman v. Wead*, 18 Ill. 304, 306 (1857).

⁴² *Lake Shore & M. S. Ry. Co. v. Hessions*, 150 Ill. 546, 557 (1894).

⁴³ *Glover v. Radford*, 120 Mich. 542, 544 (1899).

⁴⁴ *White River Log & Booming Co. v. Nelson*, 45 Mich. 578, 580 (1881).

⁴⁵ *Lake Shore & M. S. Ry. Co. v. Hessions*, *supra*.

in a single count, and a recovery may be had *pro tanto*.⁴⁶ Different, antagonistic and dissimilar causes of action cannot be joined in the same count.⁴⁷ And as many distinct grounds of recovery as are deemed necessary may be set forth in a declaration, provided enough be proved to make out a complete cause of action.⁴⁸ It is not necessary to prove all of the counts of a declaration or to prove allegations which are not essential to the cause of action; nor is a cause affected by disproving unnecessary allegations.⁴⁹ Under statute, one good count sufficiently proved sustains a judgment.⁵⁰ This is not so at common law.⁵¹

434 Misjoinder of counts, test

The general and formal characteristic of a count in a particular form of action, and not the substantial elements of a cause of action, control the question of misjoinder.⁵² Several counts do not state the same cause of action if they require different evidence to support them, or if a judgment on one can be pleaded in bar to a subsequent suit upon the other.⁵³

435 Election of counts, practice

It is error for a court to require the plaintiff to elect under which count his case should be submitted to the jury. But a court may submit the issues to the jury under a count which the plaintiff's evidence fairly tends to sustain.⁵⁴

436 Election of counts, motion of

Now comes the plaintiff, by, his attorney, and, pursuant to the rule entered on the plaintiff in this cause, on

⁴⁶ *Krug v. Ward*, 77 Ill. 603, 605 (1875); *Godfey v. Buckmaster*, 1 Seam. 447, 450 (1838); *Brady v. Spurek*, 27 Ill. 477, 482 (1861).

⁴⁷ *Southern Ry. Co. v. Bunnell*, 36 So. 380, 382 (Ala. 1903); *Illinois Central R. Co. v. Abrams*, 84 Miss. 456, 463 (1904); *Noetling v. Wright*, 72 Ill. 390, 392 (1874).

⁴⁸ *Weber Wagon Co. v. Kehl*, 139 Ill. 644, 656, 657 (1892); *Postal Telegraph-Cable Co. v. Likes*, 225 Ill. 249, 258 (1907); *Scott v. Parlin & Orendorff Co.*, 245 Ill. 460, 462 (1910).

⁴⁹ *Postal Telegraph-Cable Co. v. Likes*, 225 Ill. 262.

⁵⁰ *Consolidated Coal Co. v. Schneider*, 167 Ill. 539, 541 (1897); *Olson v. Kelly Coal Co.*, 236 Ill. 502, 504, 505 (1908); Sec. 78 Practice act (Ill.).

⁵¹ *Consolidated Coal Co. v. Schneider*, *supra*.

⁵² *Selby v. Hutchinson*, 4 Gilm. 319, 327 (1847).

⁵³ *Wabash R. Co. v. Bhymer*, 214 Ill. 579, 586 (1905); *Brady v. Spurek*, 27 Ill. 482.

⁵⁴ *Luken v. Lake Shore & M. S. Ry. Co.*, 248 Ill. 377, 384 (1911).

the day of, 19..., elects to retain the following counts of the declaration filed on the day of, 19..., to wit:

The count, being pages ... to ..., inclusive, of said declaration.

The count, being on pages ... to ..., inclusive.

COMMENCEMENT AND CONCLUSION

ASSUMPSIT

437 District of Columbia

The plaintiff sues the defendant for money payable by the defendant to the plaintiff.

Conclusion

And the plaintiff claims the sum of dollars with interest and costs.

.....
Attorney for plaintiff.

or

Wherefore, the plaintiff claims dollars and interest at the rate of per cent from besides costs.

.....
Attorney for plaintiff.

438 Florida

....., by, his attorney, sues defendant.

or

....., copartners doing business as by their attorneys,, sues a corporation organized and existing under the laws of the state of Florida.

Subsequent counts

And plaintiff further sues the defendants.

Conclusion

To the plaintiff's damage in the sum of dollars; and plaintiff claims dollars.

or

Wherefore, she claims damages in the sum of dollars.

or

Wherefore, plaintiff sues and claims dollars.

.....
Attorney for plaintiff.

439 Illinois

....., plaintiff in this suit, by,
 h attorneys, complain of, defendant in
 this suit, summoned, etc., of a plea of trespass on the case on
 promises.

Conclusion

Yet, the defendant, although often requested so to do, ha
 not paid the said several sums of money above mentioned, or any
 or either of them, or any part thereof to the said plaintiff, but
 to pay the same, or any part thereof, to the said plaintiff
 ha hitherto altogether refused, and still do refuse; to the
 damage of the said plaintiff of dollars, and
 therefore, the plaintiff bring h suit, etc.

or

Nevertheless, the said defendant, not regarding his said prom-
 ses and undertakings, but contriving, etc., hath not as yet paid
 the said several sums of money, or any or either of them, or any
 part thereof, to the said plaintiff, although the said defendant,
 afterwards, to wit, on the day and year last aforesaid, to wit, at
 said county, was requested by the said plaintiff
 so to do, but said defendant so to pay the same hath hitherto
 wholly neglected and refused, and still doth neglect and refuse;
 to the damage of the plaintiff of dollars, and
 therefore, the said plaintiff bring h suit, etc.

.....
 Plaintiff's attorney.

440 Maryland

....., by, his attorney, sues
 for money payable by the defendant to the plaintiff.

Conclusion

And the plaintiff claims \$.

.....
 Attorney for plaintiff.

441 Michigan

....., a corporation, organized and existing under
 the state of, plaintiff herein, by, its
 attorney, complains of, defendant herein, of
 a plea of trespass upon the case upon promises, filing this
 declaration as commencement of suit.

Conclusion

Yet the said defendant has disregarded its said promises and
 has not, although often requested so to do, paid any of the said

sums of money, or any part thereof; to the plaintiff's damage of dollars, and therefore he brings suit, etc.

.....
Attorney for plaintiff.

442 Mississippi

Comes plaintiff,, by his attorney,, and complains of defendant, a resident of district of county in the state aforesaid, and for cause of action states the following:

Conclusion

Wherefore, plaintiff sues and prays judgment for said sum and all costs.

or

Wherefore, plaintiff brings this suit and asks judgment for the sum of dollars with legal interest thereon from, 19.., and all costs in this behalf expended.

or

The plaintiff, therefore, demands judgment, for the use aforesaid, against the defendant for the sum of dollars with interest thereon from the day of, 19..

.....
Plaintiff's attorney.

443 Virginia

..... complains of of a plea of trespass on the case in assumpsit.

Conclusion

Wherefore, the said plaintiff says that by reason of the premises he is injured and hath sustained damages to the amount of dollars. And, therefore, he institutes this action of trespass on the case in assumpsit.

or

And the plaintiff avers that by reason of the premises an action hath accrued to it to demand of the defendant and have of it the said damages in the (several) counts of this declaration mentioned, and which, though often demanded, the defendant hath hitherto wholly refused to pay; and, therefore, it brings this suit.

.....p. q.

444 West Virginia

..... of, a corporation, complains of
..... of a plea of trespass on the case on promises.

Conclusion

Nevertheless, the said defendants not regarding their said several promises and undertakings have not kept, performed, or fulfilled the same, although often requested so to do, but have broken the same, as aforesaid, to the damage of said plaintiff's dollars; and therefore, they sue.

or

Yet, the said defendant, not regarding his several promises and undertakings in the several counts hereinbefore mentioned, has not paid to plaintiff, or anyone for it, the several sums of money above mentioned, or either of them, or any part thereof, although often requested so to do; but the same, or either of them, or any part thereof to pay, has hitherto wholly neglected and refused, and still does neglect and refuse, to the damage of the said plaintiff of dollars; and therefore, it brings its suit.

.....p. q.

CASE

445 District of Columbia

The plaintiff sues the defendant and for cause of action states as follows:

Conclusion

Wherefore, he brings this suit and claims dollars besides costs.

or

To the damage of the plaintiff of dollars, wherefore, the plaintiff claims of the defendant the sum of dollars and cost of this suit.

or

And the said plaintiff claims damages of said defendant in the sum of dollars besides costs; and wherefore, he brings his suit against the said defendant.

.....
Attorney for plaintiff.

446 Illinois

....., plaintiff, by, h attorney
complains of defendant, of a plea of trespass on
the case.

Conclusion

Wherefore, the plaintiff says that he injured and
ha sustained damage to the amount of dollars,
and therefore h bring h suit, etc.

or

To the damage of the plaintiff in the sum of
dollars (\$.....), and therefore, he brings his suit.

or

By means of which said grievances the plaintiff has been
damaged in the sum of dollars, and he therefore,
brings his suit, etc.

.....
Attorney for plaintiff ,

447 Maryland

..... by her attorney sues
copartners trading as and the mayor and city
council of

Conclusion

And the plaintiff claims dollars damages.

.....
Plaintiff's attorney.

448 Michigan

....., plaintiff herein, by, his attorneys,
complains of, defendant herein in a plea of tres-
pass on the case, the said having been duly sum-
moned herein by writ of summons to answer the said plaintiff.

Conclusion

By reason of which and whereby the said plaintiff has suffered
damage to a large amount, to wit, in the sum of
dollars, and therefore, he brings suit.

.....
Plaintiff's attorney.

.....
Business address.

449 Mississippi

..... brings this suit against and by way of showing a cause of action states the following:

Conclusion

All to his damage in the sum of dollars; wherefore, he brings suit and demands judgment for said sum, together with all costs.

.....
Plaintiff's attorney.

450 Virginia

..... complains of incorporated under the laws of the state of Virginia, of a plea of trespass on the case.

Conclusion

To the damage of the said plaintiff in the sum of dollars, and therefore, he brings this suit.

..... p. q.

451 West Virginia

....., plaintiff, complains of, who has been summoned, etc., of a plea of trespass on the case.

Conclusion

Wherefore, the said plaintiff says that he is injured and has sustained damages to the amount of dollars, and therefore, he brings his suit.

or

Wherefore, and by means of the premises and of the wrongs, grievances and injuries hereinbefore mentioned and set forth, the said plaintiff hath sustained damages to the amount of dollars; and therefore he sues.

.....
Plaintiff's attorneys.

COVENANT

452 General commencement

....., plaintiff, complains of, defendant, of a plea of a breach of covenant.

or

....., a corporation, etc., executor, etc., of,
....., deceased, complains of, of
a plea of covenant broken.

Conclusion

And so the said plaintiff saith that the said defendant, although often requested and demanded so to do, by said plaintiff, executor as aforesaid, since the death of the said and by the said during his life time, hath not kept the said covenant so by her made as aforesaid, but hath broken the same, and to keep the same with the said plaintiff, executor as aforesaid, since the death of the said, and with the said during his life time, hath hitherto wholly neglected and refused, and still doth neglect and refuse, to the damage of the said plaintiff, executor as aforesaid, of dollars. And therefore, the said plaintiff brings his action.

..... p. q.

DEBT

453 District of Columbia

The commencement and the conclusion in debt is the same as in assumpsit.

454 Illinois

..... plaintiffs, who sue for the use of, complain of, defendants, summoned to answer the said plaintiffs in a plea wherefore they owe to and unjustly detain from the plaintiffs the sum dollars.

Conclusion

And the said plaintiffs aver, that by means of the breaches aforesaid, an action hath accrued unto the said plaintiffs to have and demand of the defendants the said sum of dollars above demanded; yet, the said defendants have not paid, or caused to be paid, unto the plaintiffs, or either of them, the said sum of dollars, or any part of the said sum above demanded, but on the contrary have wholly neglected and refused so to do, and still do neglect and refuse, to the damage of the plaintiffs in the sum of dollars; and therefore, they sue for the use of the said, etc.

455 Maryland

..... county, sc.
 by, his attorney, sues

Conclusion

And the plaintiff claims therefore the sum of
dollars.

.....
Attorney for plaintiff.

456 Mississippi

....., by his attorney,, complains of
....., of a plea that he render to plaintiff the sum of
..... dollars which he owes and unjustly detains from
him. (Conclude as in assumpsit)

457 Virginia

....., a corporation created and doing business un-
der the laws of the United States, complains of,
of a plea that they render unto it the sum of
dollars which to it they owe and from it unjustly detain.

Conclusion

Yet, the said defendants, although often requested, have not,
nor hath either of them nor anyone of them, as yet paid to the
said plaintiff the said sum of dollars above de-
manded, nor any part thereof, or of the interest thereon as afore-
said, but the same to pay have hitherto wholly neglected and re-
fused, and still do neglect and refuse, to the damage of the said
plaintiff of dollars.

And therefore it brings its suit.

.....
By counsel.

.....
Counsel.

458 West Virginia

..... complains of, of a plea that he
render unto the said plaintiff the sum of dollars
(\$.....), which to him the said defendant owes, and from
him unjustly detains.

or

The town of, a municipal corporation, under
the laws of the state of West Virginia, which sues for the use
and benefit of, complains of and
....., a corporation under the laws of the state of West
Virginia, who have been duly summoned to answer of a plea that
they render unto the said the sum of
dollars, which to her they owe and from her unjustly detain.

Conclusion

Yet, the said defendants, although often requested, have not, nor has either of them, as yet paid to the said plaintiff (or the said⁵⁵), the said sum of dollars, with interest or any part thereof, but the same to pay have hitherto wholly refused and still do refuse, to the damage of the said plaintiff of dollars and interest; and therefore it brings this suit.

.....p. q.

DETINUE

459 General commencement

....., complain of of a plea that h render to the said plaintiff of the said plaintiff of great value, to wit, of the value of dollars, which h unjustly detains from

or

..... complain of said of a plea that they the said, and each of them, render unto the said plaintiffs certain goods and chattels and personal property of the said plaintiffs, of great value, to wit, of the value of dollars, which they, the said defendants, and each of them, unjustly detain from said plaintiffs.

Conclusion

Yet, the said defendant , although he w afterwards, to wit, on the day of, 19..., requested by the said plaintiff so to do, ha not as yet re-delivered the said to the plaintiff , but ha hitherto wholly neglected and refused, and still do neglect and refuse so to do, and still unjustly detain the same from the plaintiff

or

Yet, the said defendants, and each of them, although they were often requested by plaintiffs to do so, have not yet delivered the said, the personal property aforesaid, or any part thereof, to said plaintiffs, or either of them, but have hitherto wholly neglected and refused, and still doth neglect and refuse to so deliver said property or any part thereof, unjustly detaining the same from the plaintiffs, and each of them, to the damage of plaintiffs in the sum of dollars; and therefore, plaintiffs bring this suit.

⁵⁵ Include where there is a beneficial plaintiff.

or

Nevertheless, the said defendant well knowing the said last mentioned to be the property of the said plaintiff, and of right to belong and appertain to, ha not as yet delivered the said last mentioned to the said plaintiff, although w afterwards, to wit, on the day of, 19.., requested by the said plaintiff so to do, but ha hitherto wholly refused; and still do refuse so to do, and ha detained, and still do detain, the same from the said plaintiff, to the damage of the said plaintiff in the sum of dollars. And therefore, h bring suit.

..... p. q.

EJECTMENT

460 Illinois

....., plaintiff, in the above entitled cause by h attorney, complain of, defendant, who ha been summoned according to the statute in such case made and provided, in a plea of ejectment.

Conclusion

To the damage of the said plaintiff of (State a nominal sum) dollars; and therefore h bring this suit.

461 Michigan

..... and, trustees, plaintiffs herein, by, their attorney, complain of, defendant, herein, of a plea of ejectment, filing this declaration, entering rule to plead, etc., as commencement of suit.

Conclusion

To the damage of said plaintiff of dollars; and therefore, he brings suit, etc.

.....
Plaintiff attorney.

.....
Business address.

462 Virginia

..... and, plaintiffs, complain of, defendant, of a plea of trespass.

Conclusion

To the damage of the said plaintiffs dollars,
and therefore they bring their suit.

.....p. q.

REPLEVIN

463 Illinois

....., a corporation duly organized and doing business under the laws of the state of, by, its attorneys, complains of, sheriff of county, Illinois, defendant, of a plea wherefore he took the goods and chattels of plaintiff and unjustly detained the same until the day of, 19..

Conclusion

Wherefore, plaintiff says it is injured and has sustained damage to the amount of dollars, and therefore, it brings its suit, etc.

464 Michigan

Inasmuch as, defendant, did unlawfully detain certain goods and chattels, the property of, plaintiff herein described in the writ of replevin in this cause and hereinafter set forth, said defendant was summoned to answer said plaintiff, and thereupon the said plaintiff, by, his attorney, complains against the said defendant of a plea of replevin.

Conclusion

To the damage of the said plaintiff of dollars, and therefore he brings suit.

465 Mississippi

The plaintiff,, by his attorney, complains of, defendant, of a plea wherefore he took the goods and chattels of plaintiff and unjustly detains the same in this, to wit:

Conclusion

Wherefore, for the unlawful and unjust detention by the defendant of said (Describe property), plaintiff was deprived of the use thereof and damaged to the extent of dollars, and therefore, he brings this suit and demands judgment with costs.

.....

Plaintiff attorney.

TRESPASS

466 District of Columbia

The commencement and the conclusion in an action of trespass are the same as in an action on the case.

467 Illinois

....., plaintiff in this suit, by, h
attorney, complain of, defendant in this
suit, summoned, etc., of a plea of trespass.

Conclusion

Wherefore, the plaintiff say that he injured and
ha sustained damage to the amount of dollars;
and therefore, he bring h suit, etc.

.....
Plaintiffs' attorney.

468 Mississippi

Comes, a citizen of the county,
Mississippi, by his attorney,, in an action of tres-
pass, and sues, a citizen of county,
Mississippi, and for his cause of action plaintiff alleges the fol-
lowing statement of facts:

Conclusion

Wherefore, for said wrong and injury plaintiff sues and de-
mands judgment against the said defendant for the total sum
of dollars, and all costs of suit.

TROVER

469 Generally

In trover, which is an action of trespass on the case, the com-
mencement and the conclusion of a declaration are the same
as in case.

PARTIES

470 Administrator (District of Columbia)

The plaintiff,, administratrix of the estate of
....., deceased, duly appointed such administratrix by
the supreme court of the District of Columbia, holding a special
term for orphan's court business who now brings her letters
of administration in that behalf, and who sues the defendant, a
corporation doing business in the District of Columbia.

(Illinois)

For that whereas, said intestate, on, to wit, the day of, 19.., died at the city of, in said county, and was at the time an inhabitant of said county, and thereafter such proceedings were taken and had in the probate court for said county that upon, to wit, the day of, 19.., plaintiff was by an order of said probate court, duly and lawfully appointed administratrix of the estate of said intestate, and then and there duly qualified as such officer and entered on the performance of the duties of said trust; and plaintiff brings into court here letters of administration of said probate court which give sufficient evidence to the court here of the grant of administration to plaintiff, as aforesaid, the day whereof is the day and year in that behalf mentioned.

471 Corporations (Illinois)

....., a corporation organized and established under the act of Congress of the United States of America, known as the National Banking act, plaintiff in this suit, by its attorney, complains of the, a corporation organized and established under the said act of Congress, defendant in this suit, and summoned to answer the plaintiff of a plea of

(Virginia)

....., a corporation duly created, organized and existing under the laws of the state of, the plaintiff in this suit, complains of the, a corporation, created, organized and existing under the laws of the state of, of a plea of

472 Executor (District of Columbia)

The plaintiffs, and, copartners trading as, sue defendants, and, as executors of the estate of, deceased, for that heretofore, to wit, on departed this life and heretofore, to wit, on letters testamentary were issued by the supreme court of the District of Columbia, holding a probate court, to the said defendants, and, as executors of the estate of as shown by certified copies of said letters testamentary hereto annexed and marked exhibit "A," and that the said defendants had qualified as such.

(Florida)

....., as executor of the last will and testament of deceased, plaintiff, by, his attorney,

alleges that the said departed this life on day of, 19.., that he is the duly appointed and qualified executor of said last will and testament and the execution thereof, and as such executor, complains of, who has been summoned to answer the plaintiff:

473 Foreign corporations (District of Columbia)

The plaintiff,, sues the defendant,, a corporation, duly incorporated under the laws of, having an office and doing business within the District of Columbia, and empowered by law to do and transact the business of, within the District of Columbia.

(Florida)

....., by, his attorney, sues the, a corporation duly organized and existing under and by virtue of the state of, doing business and having a business office and agent in county, Florida, the defendant, which has been summoned to answer him in an action on the case, damages dollars.

(Illinois)

....., plaintiff in this suit, by, h attorney, complain of the, a corporation existing under and by virtue of the laws of the state of, and doing business in the state of, defendant , of a plea of

or

The, a body politic and corporate created by the state of, was summoned to answer the, a body politic and corporate created by the King of Great Britain, by and with the advice and consent of the senate and house of commons of the Dominion of Canada, of a plea of; and thereupon the said plaintiff by, its attorneys, complains.

(Maryland)

....., by, her attorneys, sues, of, a corporation legally incorporated under the laws of the state of, and duly authorized to do business and doing business in the state of Maryland.

(Michigan)

....., plaintiff, herein by, his attorney, complains of (a foreign corporation), legally au-

thorized to do a fire insurance business in the state of Michigan, and to issue policies of insurance against loss by fire in said state, and who is named defendant herein, of a plea of, filing this declaration as commencement of suit.

(Mississippi)

Comes, a citizen of county, by his attorney, and complains of, a corporation organized and authorized under the laws of the state of, having its principal office and place of business in said, operating and doing an insurance business with officers and agents in the county of, in the state of Mississippi, said agents being and, insurance commissioner of said state, who by virtue of law, being also its agent upon whom process can be served as defendant in an action of

474 Husband and wife

....., and, his wife, complain of the city of, a corporation organized, existing and doing business under the laws of the state of West Virginia, which has been duly summoned, etc., of a plea of

475 Municipality (Illinois)

....., by, his guardian, plaintiff in this suit, by, his attorney, complains of the city of, a municipal corporation organized and existing under and by virtue of the laws of the state of Illinois, defendant, of a plea of

(Mississippi)

The plaintiff,, a citizen of county, Mississippi, by attorney, complains that the defendant, mayor and boards of aldermen and councilmen of the city of, in an action of; and for cause of action shows the following facts, to wit:

476 Next friend (Florida)

The plaintiff,, an infant of the age of years, by, her next friend, sues the defendant,, a corporation created and existing under and by virtue of the laws of the state of, which has been summoned, etc., and says:

(Illinois)

.....
, plaintiff, by, his father and next friend, who is admitted by the court here to prosecute for the said, who is a minor, by, his attorney, complains of the company, defendant, of a plea of

(Michigan)

....., by, who is permitted by the court here to prosecute for the said, who is an infant under the age of twenty-one years, as the next friend of said, plaintiff in this suit, by, his attorneys, complains of, who is a resident of said county, defendant herein, of a plea of, filing this declaration, with a rule to plead, etc., in accordance with the statute, as commencement of suit.

(Virginia)

....., by, who is admitted by the court here to prosecute for the said, who is an infant under twenty-one years, as next friend of, complains of, a corporation, etc., of a plea of

477 Nominal plaintiff

....., who sues for the use of, plaintiff, complains of, who was summoned, etc., as defendant, in a plea of

478 Partners

..... and, copartners doing business under the firm name and style of, plaintiffs in this suit, by, their attorneys, complain of, doing business as, defendants herein, summoned, etc., of a plea of

Surviving partner

....., sole surviving partner of the firm of
, plaintiff in this suit, by, his attorney, complains of, a corporation existing under and by virtue of the laws of the state of, defendant, of a plea of

479 People (Illinois)

The people of the state of, plaintiff, by their attorney, upon order of the board of county commissioners of county, complain of, of a plea of

(Maryland)

The state of Maryland to the use of, by and, its attorneys, says:

480 Railroad company

Comes the plaintiff,, a corporation incorporated under the laws of the state of and domiciled in in the state of, and in this its cause of action against, domiciled at, in the city of, operating a line of railroad in and through the state of Mississippi, having a regular stopping place in and a regular agent upon whom service of process can be had, and shows unto the court in its cause of action, the following statement of facts, towit:

or

Comes the plaintiff,, resident citizen of the, county, Mississippi, by his attorney and complains of, a corporation chartered under the laws of the state of Mississippi and owning and operating a railroad in the district of county, Mississippi, where it has its tracks, offices, officers and agents, and as cause of action states as follows:

481 Receivers

....., plaintiff in this suit, by, her attorney, complains of, a corporation and receiver of said defendant summoned herein of a plea of

or

....., plaintiff in this suit, by, her attorneys, complains of, receivers of the, a corporation, and of the property and effects thereof, under and by virtue of an order of the court of the United States in and for the district of, and division thereof, of a plea of

EXHIBITS

482 Nature and effect

An exhibit or an instrument sued upon which is appended to the declaration is no part thereof;⁵⁶ and it will not be noticed upon demurrer.⁵⁷ But, an instrument may be made a part of the declaration by setting out the instrument *in haec verba* as an exhibit and referring to it in the declaration.⁵⁸ In Mississippi, exhibits attached to a declaration and made a part thereof by averment are as much part of the declaration as if they were set out in *haec verba* in the declaration.⁵⁹ A notice of a copy of an instrument sued upon limits the proof to be heard upon the trial.⁶⁰

483 Necessity

It is not necessary, in Illinois, to file a copy of an instrument sued upon where the declaration sets forth the instrument *in haec verba*.⁶¹

484 Amendment

It is descretionary with the trial court to permit an amendment of a copy of the instrument sued upon.⁶²

AFFIDAVIT OF CLAIM

485 Nature and effect, presumption

An affidavit of claim is a pleading which is authorized by statute, although it is no part of the declaration itself.⁶³ In the absence of a bill of exceptions a reviewing court will presume that a proper affidavit of plaintiff's claim was filed to authorize the judgment.⁶⁴

⁵⁶ *Clemson v. State Bank*, 1 Scam. 45, 46 (1832); *Bogardus v. Trial*, 1 Scam. 63, 64 (1832); *Riley v. Yost*, 58 W. Va. 213, 214 (1905).

⁵⁷ *Harlow v. Boswell*, 15 Ill. 56, 58 (1853).

⁵⁸ *Goodyear Shoe Machinery Co. v. Selz, Schwab & Co.*, 157 Ill. 186, 193 (1895).

⁵⁹ *Keystone Lumber Yard v. Yazoo & M. V. R. Co.*, 47 So. 803, 804 (Miss. 1908); *Blackwell v. Reid & Co.*, 41 Miss. 102, 103 (1866), overruled.

⁶⁰ *Humphrey v. Phillips*, 57 Ill. 132, 136 (1870).

⁶¹ *Phenix Ins. Co. v. Stocks*, 149 Ill. 319, 324 (1893); *Benjamin v. Delahay*, 2 Scam. 574, 575 (1840); Sec. 32, Practice act 1907.

⁶² *Stratton v. Henderson*, 26 Ill. 68 (1861).

⁶³ *Healy v. Charnley*, 79 Ill. 592, 594 (1875); Sec. 55, Practice act 1907.

⁶⁴ *Garrity v. Lozano*, 83 Ill. 597, 598 (1876).

486 Optional

It is optional with the plaintiff to file an affidavit of claim.⁶⁵

487 Persons making

An affidavit of claim may be made by the plaintiff, his attorney, his agent, or any other person who knows of, and can swear to, the facts.⁶⁶ In suits by several plaintiffs the affidavit may be sworn to by one of them.⁶⁷

488 Requisites

The giving of the term of court is not essential to an affidavit of claim, if the affidavit is entitled in the case and it is capable of being identified as belonging to the particular case in which it is filed.⁶⁸ The affidavit should state the exact amount due, including interest at the time of the making of the affidavit; or it should fully state the facts from which the correct amount due may be determined by calculation of interest.⁶⁹ It should state "that there is now due from the defendant to the plaintiff, after allowing to the defendant (not him or them) all just credits."⁷⁰

489 Filing

An affidavit of claim should be filed with the declaration, regardless of when the suit is actually commenced.⁷¹

490 Amendment

An affidavit of claim is subject to amendment the same as any pleading in the case.⁷²

⁶⁵ Kern v. Strasberger, 71 Ill. 303, 305 (1874); Sec. 55, Practice act 1907.

⁶⁶ Honore v. Home National Bank, 80 Ill. 489, 490 (1875); Garrity v. Lozano, *supra*; Wilder v. Arwedson, 80 Ill. 435, 436 (1875); Sec. 55, Practice act 1907.

⁶⁷ Haggard v. Smith, 71 Ill. 226, 227 (1874).

⁶⁸ Honore v. Home National Bank, 80 Ill. 491.

⁶⁹ Gottfried v. German National

Bank, 91 Ill. 75, 76 (1878); Sec. 55, Practice act 1907.

⁷⁰ New York National Exchange Bank v. Reed, 232 Ill. 123, 125 (1908). For forms, see actions of assumpsit, debt, etc.

⁷¹ Honore v. Home National Bank, 80 Ill. 491; Sec. 55, Practice act 1907.

⁷² Healy v. Charnley, 79 Ill. 592, 594 (1875); Secs. 39, 55, Practice act 1907.

491 Objections, practice

The only way to raise objection to an affidavit of claim is by refusing to file an affidavit of merits with the plea; objections or exceptions to the plaintiff's affidavit come too late after default.⁷³

RULE TO PLEAD

492 Practice

The rule to plead must either be attached to, or endorsed upon, the declaration, and served personally on the defendant.⁷⁴

493 Requisites

In actions against several defendants commenced by declaration, the rule to plead must be against all of the defendants.⁷⁵

494 Form

In the above mentioned cause, upon motion of, attorney for said plaintiff, it is ordered that the above named defendant appear and plead to the declaration in said cause within fifteen days after service upon said defendant of a copy of said declaration and notice of this rule, in accordance with the statute in such cases made and provided.

Dated, etc.

., Clerk.

., Plaintiff's attorney.

.

Business address.

495 Entry of rule

A mere irregularity in the entry of a rule to plead is not jurisdictional where the notice is regular and the defendant has been given ample time in which to plead.⁷⁶

NOTICE TO PLEAD

496 District of Columbia

The defendant is to plead hereto on or before the 20th day, exclusive of Sundays and legal holidays occurring after the day of the service hereof; otherwise judgment.

.

Attorney for plaintiff.

⁷³ Knott v. Swannell, 91 Ill. 25, 26 (1878); Kern v. Strasberger, 71 Ill. 303, 305 (1874).

⁷⁴ (9985), C. L. 1897, amended in 1905.

⁷⁵ Ralston v. Chapin, 49 Mich. 274, 277 (1882).

⁷⁶ Howe v. Maltz, 35 Mich. 500 (1877).

497 Maryland

To defendant:

Take notice that on or before day of, 19.., you will be required to plead to the foregoing declaration, or judgment will be rendered against you by default.

or

To the defendant:

Take notice that on the day of your appearance in this court in this action, a rule will be entered requiring you to plead to the declaration herein within fifteen days thereafter.

.....
Attorney for plaintiff.

498 Michigan

To the within named defendant:

Take notice, that on filing a declaration in this cause of which the within is a true copy, as commencement of suit, a rule to plead was endorsed thereon and filed therewith (or, a rule was entered in the book of common rules, kept by the clerk of said court in his office in the city of), requiring you to appear and plead to said declaration within fifteen days after the service on you of a copy thereof and of notice of said rule, or judgment, etc.

Dated, etc.

.....
Attorney for plaintiff.

DEMAND FOR JURY**499 Election**

To the honorable, the judge of said court:

The plaintiff in the above entitled cause elects to have the same tried before a jury, and begs leave of court so to do.

.....
Attorney for plaintiff.

500 Notice

To the defendant:

Take notice that the plaintiff in the above entitled cause elects to have the same tried before a jury.

.....
Attorney for plaintiff.

PRAECIPE**501 Maryland**

Mr. Clerk:

Please issue summons for the defendant, and send a copy of

the declaration with the writ, and make the writ returnable the
 Monday of, 19..

or

Mr. Clerk:

Please issue in this case, and send copy of the declaration and
 notice with the writ, to be served on the defendant, and make
 the writ returnable on the of,

.....

Attorneys for plaintiff.

SERVICE

502 Statute of limitations

An action commenced by declaration is not begun for the
 purpose of preventing the running of the statute of limitations
 until there is personal service upon the defendant of a copy of
 the declaration and the rule to plead.⁷⁷

503 Service, by whom

In suits commenced by declaration, the service of a copy
 thereof may be made by private persons, or by the plaintiff.
 This applies to all plaintiffs, even to deputy sheriffs.⁷⁸

504 Proof, requisites; presumption

The affidavit or return of service must show service of notice
 of the rule to plead.⁷⁹ If service is had upon more than one
 defendant, the return or affidavit must specifically show that
 a copy of the declaration and rule to plead were served upon
 each of the defendants.⁸⁰ The affidavit need not show the
 authority of the officer before whom it is made if he is one of
 the officers of whose authority a court takes judicial notice.⁸¹
 The time of service is sufficiently stated in a return if the date
 of service appears in the jurat of the affidavit.⁸² In the absence
 of a statement in the affidavit of service showing where the de-
 fendant was served, it will be presumed that the service was

⁷⁷ *Detroit Free Press Co. v. Bagg*,
⁷⁸ Mich. 650, 654 (1889).

⁷⁸ *Munn v. Haynes*, 46 Mich. 140,
 142 (1881); *Penfold v. Slyfield*, 110
 Mich. 344, 345.

⁷⁹ *Anderson v. Cole*, 72 N. W.
 615 (Mich. 1897).

⁸⁰ *Campbell v. Donovan*, 69 N. W.
 514, 515 (Mich. 1896).

⁸¹ *Norvell v. McHenry*, 1 Mich.
 227, 233 (1849).

⁸² *Norvell v. McHenry*, *supra*.

made in the proper county or place. The statute does not require in an affidavit of service the statement of the place of service.⁸³

505 Proof, forms (District of Columbia)

District of Columbia, ss.

I, having been duly sworn, do affirm and say, that I am personally acquainted with the defendant,, and that on the day of, 19.., I have served a copy of the declaration, notice to plead, affidavit and bill of particulars filed in this cause upon the defendant, in at, at about o'clock innoon of said day.

Subscribed, etc.

(Michigan)

..... being duly sworn, says that on the day of,, he served a declaration of which the within is a copy, on, the defendant named in said declaration, by delivering to said defendant, in said county of, a true copy thereof, together with a true copy of the notice to appear and plead, endorsed thereon as hereon endorsed.

Subscribed, etc.

or

I hereby certify and return, that on the day of, 19.., I served the declaration, of which the within is a copy, on the township of, the defendant named in said declaration, by delivering to said defendant's supervisor, at the of, in said county of, a true copy thereof, and of the foregoing bill of particulars, and the notice relating thereto, together with a true copy of the notice to appear and plead endorsed thereon as hereon endorsed.

Fees

.....
Under-sheriff.

506 Proof, contradicting

A return of personal service made by a private person is not conclusive upon the defendant, and it may be contradicted.⁸⁴

⁸³ Norvell v. McHenry, *supra*.

Detroit Free Press Co. v. Bagg, 78

⁸⁴ Campbell v. Donovan, *supra*; Mich. 650, 653.

FILING

507 Time

In actions commenced by declaration, the actual filing of the declaration must precede the service of a copy thereof.⁸⁵

508 Delivery to clerk

The delivery of an instrument or pleading to the proper officer, if received by him for filing and kept on file, constitutes a filing; and the failure of the officer to place his file-mark on the instrument so presented and received, and his omission to actually keep the document on file do not effect the validity of the filing.⁸⁶

509 Dismissal for want of Narr., practice

Upon plaintiff's failure to file a declaration within the time required by statute and rules, it is mandatory in Virginia, upon the clerk to enter the suit dismissed;⁸⁷ and if he fails to do so, the court has authority to correct the misprision at the succeeding term;⁸⁸ but it has no power to grant leave to the plaintiff to file his declaration then, except upon good cause shown. The clerk's dismissal of a suit is in the nature of a non suit, and no suit will be reinstated merely for the reason that the plaintiff may suffer inconvenience or loss by reason of its dismissal.⁸⁹

510 Dismissal, motion

And now comes the said defendant, by its attorneys, , and enters its appearance for the purposes of this motion only and moves the court to dismiss the above entitled cause, and for cause of such dismissal says that said suit was begun on the day of , 19.., and summons issued returnable to the term of said court; that said summons was returned as served on the day of , 19.., on said defendant; that plaintiff has failed and neglected to file a declaration in said cause, and for that reason the defendant moves for a judgment in accordance with the statute in such cases made and provided.

Dated, etc.

⁸⁵ *Ellis v. Fletcher*, 40 Mich. 321 (1879); *South Bend Chilled Plow Co. v. Manahan*, 62 Mich. 143 (1886).

⁸⁶ *Beebe v. Morrell*, 76 Mich. 114, 120 (1889).

⁸⁷ Sec. 3241, Code (Va.).

⁸⁸ Sec. 3293, Code (Va.).

⁸⁹ *Wickham v. Green*, 111 Va. 199 (1910).

511 Dismissal, cross-motion

And now comes the said plaintiff by, his attorney, and objects to defendant's said motion to dismiss said cause and the plaintiff now enters cross-motion for leave to withdraw said declaration and to file the same as of, 19..

AMENDMENT

512 Generally

A declaration is subject to amendment at any time before final judgment.⁹⁰ It is competent for a court to permit an amendment of a declaration, at any time before final judgment, to conform to the proofs, and thereby to remove an objection on the ground of variance.⁹¹ A court has power to grant leave to amend the declaration after all of the evidence has been submitted to the jury and the case is partially argued before them.⁹² Leave to amend the declaration may be granted upon a cross-motion for the same, after a motion has been made to exclude the evidence from the jury and to direct a verdict.⁹³

513 *Ad damnum*

The *ad damnum* is matter of form and not substance, and it is amendable after verdict.⁹⁴

514 Additional count

A count which is stricken from the files remains a part of the declaration and may form the basis of an additional count.⁹⁵

515 Immaterial matter

A count which sets up useless elements of recovery may be reformed on the ground that it is calculated to embarrass a fair trial of the case.⁹⁶

⁹⁰ Cogshall v. Beesley, 76 Ill. 445 (1875); Sec. 39, Practice act 1907 (Hurd's Stat. 1909, p. 1699); Baylor v. Baltimore & Ohio R. Co., 9 W. Va. 270, 279 (1876).

⁹¹ Brennan v. Strauss, 75 Ill. 234, 235 (1874); Kennedy v. Swift & Co., 234 Ill. 606, 612 (1908); Franke v. Hanley, 215 Ill. 216, 218 (1905); Sec. 39, Practice act 1907.

⁹² Chicago & P. R. Co. v. Stein, 75 Ill. 41, 43 (1874); Sec. 39, Practice act 1907.

⁹³ Grimes v. Hilliary, 150 Ill. 141, 144 (1894); Sec. 39, Practice act 1907.

⁹⁴ Tomlinson v. Earnshaw, 112 Ill. 311, 319 (1884).

⁹⁵ Shaughnessy v. Holt, 236 Ill. 485, 487 (1908).

⁹⁶ Tillis v. Liverpool & L. & G. Ins. Co., 46 Fla. 268, 276 (1903); Sec. 1043, Rev. Stat. (Fla.).

516 Parties, discontinuance

The omission from an amended declaration of a party who was made defendant to the original declaration is a discontinuance of the suit against the omitted defendant.⁹⁷

517 Statute of limitations

A declaration which merely states the cause of action in a defective manner and which has been filed within the limitation period may be made the basis of an amendment or of an additional count after the expiration of the limitation period. But, a declaration which states a wholly defective cause of action cannot be made the basis of an amendment or of an additional count after the limitation period has expired.⁹⁸

The introduction of a new cause of action by amendment, or the refile of previously withdrawn counts, amounts to the commencement of a new suit at the time that the amendment is made or that the counts are refiled.⁹⁹ All intendments and inferences which may reasonably be deduced from the facts stated in an original declaration are in its favor in determining whether it states a cause of action.¹⁰⁰ Matter in avoidance of the statute of limitations cannot be availed of by an amendment to the declaration, but the defense must be interposed by replication.¹⁰¹

PRACTICE

518 Stipulation

Insufficiency of averment in pleadings may be cured by stipulation of the parties.¹⁰²

519 Notice, necessity

In case of an amendment which changes the cause of action from joint to that of several after one of the defendants has

⁹⁷ *Malleable Iron Range Co. v. Pusey*, 244 Ill. 184, 200 (1910).

⁹⁸ *North Chicago Street R. Co. v. Aufmann*, 221 Ill. 614, 619 (1906); *Lee v. Republic Iron & Steel Co.*, 241 Ill. 372, 378 (1909); *Bradley v. Chicago-Virden Coal Co.*, 231 Ill. 622, 626 (1908); *Klawiter v. Jones*, 219 Ill. 626, 629 (1906); *Bahr v. National Safe Deposit Co.*, 234 Ill. 101, 103 (1908); *Illinois Central R. Co. v. Cobb, Christy &*

Co., 64 Ill. 128, 140 (1872); *Eylenfeldt v. Illinois Steel Co.*, 165 Ill. 185, 187 (1897).

⁹⁹ *Bradley v. Chicago-Virden Coal Co.*, 231 Ill. 627, 628; *Walters v. Ottawa*, 240 Ill. 262.

¹⁰⁰ *Klawiter v. Jones*, 219 Ill. 626, 629 (1906).

¹⁰¹ *Gunton v. Hughes*, 181 Ill. 132, 135 (1899).

¹⁰² *Lohr Bottling Co. v. Ferguson*, 223 Ill. 88, 95.

been defaulted, the defaulted defendant should be served with a copy of the amended declaration to afford him an opportunity to contest the right to proceed severally.¹⁰³

520 Notice, form

To, attorney for defendant:

Please take notice that the annexed are true copies of a motion filed in said cause for an order permitting an amendment to said plaintiff's declaration, and of the amendment proposed to be made in pursuance of said motion, and that said motion will be brought on for hearing on the day of at the court room in of, in said county at o'clock, or as soon thereafter as counsel can be heard.

(Signatures and business address)

521 Motion (Michigan)

Now comes the said plaintiff,, by, his attorney, and moves the court for an order permitting the said plaintiff to amend his declaration in the above entitled cause by adding a further count, to stand as the count of the said declaration, a copy of which count is hereto annexed.

This motion is based upon the files and records in this court and cause.

Dated, etc.

Order

After an appeal to the supreme court from a judgment rendered in favor of the plaintiff upon a former trial by which the case was reversed and remanded to this court for a new trial, the plaintiff now comes into court upon a motion to amend his declaration. The matter has been brought on for hearing in open court and counsel for the respective parties relative to the motion have been heard. After due consideration of the same it is hereby ordered that said plaintiff be and hereby is allowed to amend his declaration by adding thereto a count, a copy of which is attached to said motion.

In view of the misfortunes and pecuniary circumstances of the plaintiff in this cause, this motion is allowed without costs or other conditions.

Dated, etc.

.....
Judge.

¹⁰³ Munn v. Haynes, 46 Mich. 140, 146 (1881).

522 Petition (Maryland)

To the honorable the judges of said court.

The petition of the plaintiff in the above entitled case respectfully shows unto your honor:

1. That on the day of, 19.., she sued in this court the defendant in the above case.

2. That on account of information recently received by the counsel of your petitioner, your petitioner is desirous to file an amended declaration, as may be done under section 35 of article 75 of the Code of Public General Laws of the state of Maryland.

Wherefore, your petitioner prays the court to pass an order allowing and authorizing your petitioner to file an amended declaration, as prayed in the premises.

.....
Attorneys for petitioner.

Order

Upon the foregoing petition it is ordered, this day of, 19.., by the circuit court for county, that leave be and the same is hereby granted the plaintiff in the above entitled case to file therein an amended declaration.

.....
Judge.

523 Additional count, commencement

And the said plaintiff,, by leave of the said court first obtained, here amend he declaration by inserting therein the following additional counts immediately after the first (two) counts thereof now on file, to wit:

524 Amendment, commencement

....., a corporation organized and existing under and by virtue of the laws of the state of, plaintiff , by, attorney , by leave of court first had and obtained, files this amended declaration, and herein and hereby complain of and defendants, having been duly summoned to answer said plaintiff , of a plea of

525 Notice of amendment

To, attorney for defendant:

Please take notice that the annexed and foregoing is a true copy of amendment to the declaration in the above entitled cause and this day filed herein in pursuance of an order of said court made and entered the day of, 19..

Dated, etc.

526 Effect of amendment

An original count is abandoned and superseded by an amended count which is complete in itself.¹⁰⁴

CONSTRUCTION

527 Averments, immaterial, surplusage

An allegation which is not material to a recovery may be regarded as surplusage and rejected.¹⁰⁵ So, an additional count which requires no new evidence to sustain it, is useless and harmless.¹⁰⁶

528 Averments, material, omission

The omission of a material averment in a declaration may be cured by the plea.¹⁰⁷ In West Virginia, unless judgment cannot be given on account of the omission of something which is essential to the cause of action or the defense, a court is bound to consider a declaration as sufficient on demurrer.¹⁰⁸

529 Defects cured by verdict

The want of an express averment in a declaration of any matter which is necessary to be proved and without proof of which the jury could not have given the verdict, is cured by the verdict, if the declaration states a cause of action defectively and it contains terms which are sufficiently general to include, by fair and reasonable intendment, the facts defectively or improperly stated or omitted. But an omission is not cured by verdict, if the declaration, with all of the intendments in its favor, fails to state a cause of action.¹⁰⁹ Defects in a declara-

¹⁰⁴ *Maegerlein v. Chicago*, 237 Ill. 159, 163 (1908).

¹⁰⁵ *Tillis v. Liverpool & L. & G. Ins. Co.*, 46 Fla. 279.

¹⁰⁶ *Malloy v. Kelly-Atkinson Construction Co.*, 240 Ill. 102, 104 (1909).

¹⁰⁷ *Rubens v. Hill*, 213 Ill. 523, 537 (1905).

¹⁰⁸ *Baylor v. Baltimore & Ohio R. Co.*, 9 W. Va. 281; *Blaine v. Chasepeake & Ohio R. Co.*, 9 W. Va. 252, 261, 262 (1876); Sec. 29, c. 125, Code (W. Va.)

¹⁰⁹ *Sargent Co. v. Baublis*, 215 Ill. 428, 430, 431 (1905); *Hinch-*

liff v. Rudnik, 212 Ill. 569, 577 (1904); *Danley v. Hibbard*, 222 Ill. 88, 90 (1906); *McAndrews v. Chicago Lake Shore & Eastern Ry. Co.*, 222 Ill. 232, 241 (1906); *Walters v. Ottawa*, 240, 259, 267 (1909); *Chicago, Rock Island & Pacific Ry. Co. v. People*, 217 Ill. 164, 172 (1905); *Chicago & Alton R. Co. v. Clausen*, 173 Ill. 100, 103, 104 (1898); *Wright v. Bennett*, 3 Scam. 258, 259 (1841); *McLean County Coal Co. v. Lang*, 91 Ill. 621; *Peebles v. O'Gara Coal Co.*, 239 Ill. 370, 374, 375 (1909).

tion which would have been fatal on demurrer and to which the general issue was pleaded are cured by the verdict.¹¹⁰ So, a declaration may be considered good after default, although it might have been subject to a special demurrer.¹¹¹ Mere formal defects are cured by the verdict.¹¹² The rule that a defective declaration is cured after verdict, applies to cases in which the evidence has not been preserved by a bill of exceptions; but it is doubtful if this rule applies to cases in which the record purports to contain all of the evidence, and in which it appears that there is no evidence of a fact that is essential to the right of recovery.¹¹³

530 Form of action, identity, law and fact

The form of an action is determined from the technical averments of the declaration, and not from its introduction or commencement.¹¹⁴ The identity of a cause of action contained in different pleadings must be determined by the court, as a question of law, from the face of the pleadings, without reference to extrinsic facts or evidence.¹¹⁵

531 Good and defective counts

At common law one bad count in a declaration containing several counts is sufficient ground for arrest of judgment upon an entire or general verdict.¹¹⁶ In Illinois, one good count supported by the evidence is sufficient to sustain an entire or a general verdict and judgment upon several counts, some of which are bad.¹¹⁷ This does not mean that there must be one or more entirely good counts, but the rule applies as well to a count which defectively states a cause of action.¹¹⁸

¹¹⁰ *Barker v. Koozier*, 80 Ill. 205, 207 (1875); *Toledo, Peoria & Warsaw Ry. Co. v. McClannon*, 41 Ill. 238, 240 (1866); *Briggs v. Milburn*, 40 Mich. 512, 513 (1879).

¹¹¹ *Lawver v. Langhans*, 85 Ill. 138, 142 (1877).

¹¹² *Pittsburg, C. C. & S. L. Ry. Co. v. Chicago*, 242 Ill. 178, 185 (1909).

¹¹³ *Dama v. Kaltwasser*, 72 Ill. App. 140 (1897).

¹¹⁴ *Toledo, Wabash & Western Ry. Co. v. McLaughlin*, 63 Ill. 389 (1872).

¹¹⁵ *Heffron v. Rochester German*

Ins. Co., 220 Ill. 514, 516, 521 (1906).

¹¹⁶ *Scott v. Parlin & Orendorff Co.*, 245 Ill. 460, 464 (1910).

¹¹⁷ *Scott v. Parlin & Orendorff Co.*, *supra*; Sec. 78, Practice act 1907; *Bennett v. Chicago City Ry. Co.*, 243 Ill. 420, 434 (1910); *Peoria Marine & Fire Ins. Co. v. Whitehill*, 25 Ill. 385 (1861); *Anderson v. Semple*, 2 Gilm. 455, 458 (1845); *Roe v. Crutchfield*, 1 Hen. & Mun. 361, 365 (Va. 1807).

¹¹⁸ *Bennett v. Chicago City Ry. Co.*, 243 Ill. 434.

532 Several declarations

The last or final declaration filed is the one which controls the rights of the plaintiff, where several declarations are on file in the same cause.¹¹⁹

¹¹⁹ *Hansell-Elcock Foundry Co. v. Clark*, 214 Ill. 399, 412 (1905).

CHAPTER XIV

APPEARANCE

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IN GENERAL

533 Appearance in person and by attorney

A party to a civil action may appear in person or by attorney; but he cannot in Michigan, appear on the record in person and by attorney.¹ At common law a party against whom process has been issued, may appear without service, or before the process is served upon him.²

534 Infants, practice

A minor must appear by guardian, and not in person or by attorney; if there is no guardian the plaintiff should make application, before plea, for the appointment of a guardian *ad litem*.³

¹ (1116), C. L. 1897 (Mich.)

² Ralston v. Chapin, 49 Mich. 274, 276 (1882); Crull v. Keener, 18 Ill. 65, 66 (1856).

³ Peak v. Shasted, 21 Ill. 137 (1859); Herdman v. Short, 18 Ill. 60, 61 (1856).

535 Authority, presumption; practice

The appearance by an attorney is presumed to be under authority of the defendant; but this presumption may be rebutted if done in apt time.⁴ During the term a defendant who has not been served with process and who has not authorized his appearance may have the proceedings taken against him set aside where an attorney has appeared for him without authority.⁵ The client alone has the right to dispute an attorney's power to appear for him. It cannot be done by a third party.⁶

GENERAL APPEARANCE

536 Nature and effect

A general appearance cannot confer jurisdiction upon a court which has no jurisdiction of the subject matter.⁷ But an unlimited appearance will waive jurisdiction over the person.⁸ It also waives insufficient service of process;⁹ and all irregularities in the process are waived whether the irregularities are substantial or formal.¹⁰ So, a general appearance by a corporation waives defects in the service upon it.¹¹ A general appearance in a cause by officers or members of a private or public corporation waives defects in a notice as to them in an individual capacity, but does not waive defects as to the corporation.¹² A special appearance entered for the purpose of objecting to the jurisdiction of the court is waived by subsequently appearing generally.¹³ A general appearance by an attorney is equivalent to service of process.¹⁴ The mere entry of an appearance does not dispense with the requirement to file a declaration within the statutory time before taking default.¹⁵

⁴ *Leslie v. Fischer*, 62 Ill. 118, 119 (1871).

⁵ *Leslie v. Fischer*, *supra*.

⁶ *Martin v. Judd*, 60 Ill. 78, 84 (1871).

⁷ *Murphy v. People*, 221 Ill. 127, 130 (1906).

⁸ *Grand Pacific Hotel Co. v. Pinkerton*, 217 Ill. 61, 84 (1905).

⁹ *Mason & Tazewell Special Drainage District v. Griffin*, 134 Ill. 330, 337 (1890).

¹⁰ *Easton v. Altum*, 1 Seam. 250

(1836); *Dart v. Hercules*, 34 Ill. 395, 402 (1864); *Reed v. Curry*, 35 Ill. 536, 539 (1864).

¹¹ *Bills v. Stanton*, 69 Ill. 51, 54 (1873).

¹² *People v. Jones*, 254 Ill. 521, 522 (1912).

¹³ *People v. Smythe*, 232 Ill. 242 (1908).

¹⁴ *Abbott v. Semple* 25 Ill. 107 (1860).

¹⁵ *Hoes v. Van Alstyne*, 16 Ill. 384 (1855).

537 Time

A defendant who has been sued but who has not been served with process has a right to appear at any time before trial.¹⁶

FORMS

538 District of Columbia

¹⁷ The clerk of said court will enter my appearance for the defendant herein.

Dated

.....
Attorney for defendant.

539 Florida

To the clerk of the court:

You will please enter my appearance as attorney for the, a corporation,, and, the defendants in the above styled cause on the rule day in, 19..

.....
Attorney for defendant.

540 Illinois

I hereby enter my appearance in this cause, and request the clerk of said court to enter the same of record.

Dated, etc.

.....
Defendant.
or

We hereby enter the appearance of the above defendant, and our appearance as attorneys for him.

Dated, etc.

.....

As associate counsel

We hereby enter our appearance in the above entitled cause as associate counsel, with for the defendant,

.....
Attorneys for defendant.

541 Michigan, practice

In suits commenced by declaration the clerk is required to enter the defendant's appearance upon the filing of the affidavit

¹⁶ Ralston v. Chapin, *supra*; Penfold v. Slyfield, 110 Mich. 343, 346 (1896).

¹⁷ See Section 211, Note 60.

or of a return of service; and if the clerk neglects to make such an entry, the omission may be supplied by an order *nunc pro tunc*.¹⁸

Appointment

I hereby appoint, esquire, of, Michigan, my attorney in the above entitled cause, and authorize him to appear and to take such steps in the conduct of said cause as may, from time to time, become necessary.

Dated, etc.

.....
Defendant.

Notice to clerk

To the clerk of the above entitled court:

You will please enter my appearance as attorney for the defendant,, in the above entitled cause.

Dated, etc.

Yours, etc.,

.....
Attorney for defendant.

Notice to plaintiff

To:

Attorney for above named plaintiff.

You will please take notice that I have this day been retained as attorney for the defendant,, in the above entitled cause, and that I have caused my appearance to be entered as attorney for said defendant in the above entitled cause.

Dated, etc.

Yours, etc.

.....

.....

Business address.

(Attach affidavit of service)

CONSTRUCTIVE APPEARANCE

542 Generally

A person may become a party by appearing and participating in the proceeding.¹⁹

543 Instances

A party will be regarded as having appeared generally for all purposes where he fails to limit his appearance for **any**

¹⁸ Norvell v. McHenry, 1 Mich. 227, 234 (1849).

¹⁹ Chicago v. Walker, 251 Ill. 629, 633 (1911).

specific purpose.²⁰ The making of a motion for a separate jury, without limiting the appearance, amounts to a general appearance for all purposes.²¹ So, the making of a motion to quash service of a copy of an amended summons, without limiting the appearance to the purpose of the motion, amounts to a general appearance.²² In actions against several defendants the appearance by an attorney for "defendants" is regarded as an appearance for all of the defendants, although some of them were not served with process, unless the record negatives the presumption that the appearance was so intended.²³ But a motion by "defendants" to set aside a default which was taken against several defendants is not a general appearance by one of the defendants who has not been served with process and against whom no default could have been rendered.²⁴

SPECIAL APPEARANCE

544 Waiver

All objections that might be raised at one time must be urged upon a special appearance, or the objections that are not raised will be considered to have been waived.²⁵ A motion to dismiss a suit on the ground of variance between the writ and the declaration is not such an appearance as waives the variance.²⁶ A party does not waive his rights acquired under a special appearance by merely appearing generally for the sole purpose of insisting upon a plea to the jurisdiction, if he does not take action in defense of the suit upon its merits.²⁷ An appearance for the purpose of objecting for want of notice, does not waive notice. It is only a general appearance which waives notice.²⁸

545 Appearance

I hereby enter a limited and special appearance for the

²⁰ *Flake v. Carson*, 33 Ill. 518, 526 (1864).

²¹ *Martin v. Chicago & Milwaukee Electric R. Co.*, 220 Ill. 97, 99 (1906).

²² *Eddleman v. Union County Traction & Power Co.*, 217 Ill. 409, 412 (1905).

²³ *Kerr v. Swallow*, 33 Ill. 379, 380 (1864).

²⁴ *Klemm v. Dewes*, 28 Ill. 317,

319 (1862); *Clemson v. State Bank*, 1 Scam. 45 (1832).

²⁵ *Norton v. Dow*, 5 Gilm. 459, 461 (1849).

²⁶ *Schoonhoven v. Gott*, 20 Ill. 46, 48 (1858).

²⁷ *Gemundt v. Shipley*, 98 Md. 657, 664 (1904); *Dexter v. Lichliter*, 24 App. D. C., 222, 228 (1904).

²⁸ *People v. Jones*, 254 Ill. 523.

defendant in the above entitled cause, for the purpose of contesting the sheriff's return on the summons issued in said cause.

.....
Attorney for defendant as aforesaid.

546 Motion to quash summons

And now this day comes the above named defendant,
....., by, its attorney, who appears specially and solely for the purpose of this motion, and moves the court to quash the writ of summons issued herein on the day of, 19..; and in support thereof, begs to refer to the following in part recited facts appearing of record in this court, to wit:

1., 19.., the above entitled suit was brought against

2., 19.., a suit was commenced in this court by the said against the said, general number, for the same cause of action as declared on in the present suit, and this defendant was duly summoned therein.

3., 19.., the following plea of abatement was, by leave of court first had and obtained, filed in the present suit, to wit: (Insert plea.)

4. On, 19.., and some time after the said plea of abatement had been filed in the present suit, the said plaintiff, without notice to this defendant, procured the dismissal of his said suit, general number

5., 19.., the said plea of abatement came on to be heard before this court, and after evidence had been offered and received, and the arguments of counsel had been heard, and upon consideration thereof, the court sustained the said plea of abatement and ordered that as to, the writ be quashed, and suit dismissed at plaintiff's cost; and judgment was thereupon entered.

6. On, 19.., the said plaintiff, without notice to this defendant, procured leave of this court to make it a party defendant to his said suit, general number, from which it had the previous day been dismissed; and upon the same day, to wit,, 19.., it was again summoned as a party defendant herein.

For which, and other reasons hereafter to be shown to the court, the said defendant,, moves that the writ lately issued against it be quashed.

.....
Attorney for

WITHDRAWAL

547 Nature and effect

An attorney's withdrawal of his appearance for the defendant must be specific and unequivocal.²⁹ The withdrawal of an attorney's appearance is not the withdrawal of his client's appearance.³⁰ The withdrawing of a plea in bar does not withdraw the appearance.³¹

548 Forms (District of Columbia)

The clerk of said court will please enter my appearance in the above cause withdrawn.

(Illinois)

We hereby withdraw our appearance for the defendant in the above entitled cause.

Dated this day of, 19..

I hereby enter my appearance for the defendant in the above entitled cause and adopt the demurrer filed in said cause to the declaration.

Dated this day of, 19..

SUBSTITUTION

549 Necessity

As the law recognizes only those attorneys who appear of record in a case, attorneys who are employed to take the place of record counsel should have an order of substitution entered of record immediately upon taking charge of a pending case. Appearance and pleading without an order of substitution is ineffectual.³²

550 Forms (Illinois)

We hereby enter our appearance as attorneys for the defendants in the above entitled cause, in lieu of the appearance of, deceased.

²⁹ Hefling v. Van Zandt, 162 Ill. 162, 166 (1896).

³⁰ Mason v. Abbott, 83 Ill. 445, 446 (1876); Bills v. Stanton, 69 Ill. 54.

³¹ Dart v. Hercules, 34 Ill. 403.

³² Landyskowski v. Lark, 66 N. W. 371, 372 (Mich. 1896).

(Michigan)

I hereby consent that of, Michigan, be substituted in my place as attorney for the above named defendant.

.....

Attorney for defendant.

On reading and filing consent in writing, and on motion of substituted attorney it is ordered that the said be, and he is hereby, substituted in the place of as attorney for the above named defendant.

Dated, etc.

.....

Attorney for defendant.

.....

Business address.

CHAPTER XV

ABATEMENT AND OTHER DILATORY PLEAS

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IN GENERAL

551 Plea in abatement defined

A plea in abatement is that which objects to the place, mode or time of asserting the plaintiff's claim, without disposing its justness, requiring judgment for the defendant, and leaving it open to renew the suit in another place, or form, or at another time.¹

552 Abatement and revival

At common law, actions of tort do not survive the death of the sole plaintiff or defendant.² An action does not abate upon the plaintiff's death under Illinois Abatement act, nor in cases where an action survives.³ Upon the plaintiff's death, the action must be revived in the name of all of the survivors, or representatives.⁴ This has no application to actions of ejectment under Illinois statute.⁵

553 Nature of right

A defendant's right to plead in abatement is an absolute and valuable right.⁶ The defendant has a legal right to compel the plaintiff to comply with all the forms of the law before he can be required to answer.⁷

554 Waiver

A plea in abatement must be filed at the earliest practicable opportunity.⁸ The interposition of a motion in the place of a plea in abatement, waives the right to plead in abatement.⁹

¹ *Pitts Sons' Mfg. Co. v. Commercial National Bank*, 121 Ill. 582, 587 (1887).

² *Jones v. Barmm*, 217 Ill. 381, 382 (1905).

³ *Selden v. Illinois Trust & Savings Bank*, 239 Ill. 67, 77 (1909).

⁴ *Funk v. Stubblefield*, 62 Ill. 405, 407 (1872).

⁵ *Funk v. Stubblefield*, *supra*.

⁶ *Munn v. Haynes*, 46 Mich. 140, 142 (1881).

⁷ *Easton v. Altum*, 1 Seam. 250, 251 (1836).

⁸ *Easton v. Altum*, *supra*; *Halloway v. Freeman*, 22 Ill. 197 (1859).

⁹ *Halloway v. Freeman*, 22 Ill. 197, 202; *Martin v. Chicago & Milwaukee Electric R. Co.*, 220 Ill. 97, 100 (1906).

So the right to plead in abatement is waived by filing a plea in bar.¹⁰ The right to plead in abatement is also waived by demurring to the declaration.¹¹ Formal defects in process are waived by appearance, pleading to the merits and trial without objection.¹² An objection to the form of the action must be specifically urged at the first opportunity, or the objection is waived.¹³ The misjoinder of actions *ex delicto* in form is waived by pleading to the merits and going to trial without objection.¹⁴ The nonjoinder of parties defendant is waived, unless it is pleaded in abatement.¹⁵ A variance between the writ and the declaration, if material, must be pleaded in abatement or by motion made in apt time.¹⁶

555 Practice, abatement or bar

Any defect in the writ, its service or return, which is apparent from an inspection of the record, may properly be taken advantage of by motion, but where the objection is founded upon extrinsic facts the matter must be pleaded in abatement.¹⁷ Matter which shows that the plaintiff cannot maintain any action at any time must be pleaded in bar; matter which merely defeats the present proceeding, and which does not show that the plaintiff is forever concluded, must be pleaded in abatement.¹⁸ In an action upon a contract brought before the indebtedness is due under an extension of time, the extension must be pleaded in abatement and not in bar.¹⁹

556 Practice, motion or plea

Any objection or matter which is founded upon extrinsic facts must be pleaded in abatement, so that an issue may be formed thereon and tried, if desired, by a jury, like any other

¹⁰ *Lamb v. Chicago*, 219 Ill. 229, 234 (1906).

¹¹ *Walker v. Walker*, 14 Ill. 277 (1853).

¹² *Knott v. Pepperdine*, 63 Ill. 219 (1872).

¹³ *Citizens' Gaslight & Heating Co. v. Granger & Co.*, 118 Ill. 266, 271 (1886); Sec. 39, Practice act 1907.

¹⁴ *Helmuth v. Bell*, 150 Ill. 263, 268 (1894); *Harlem v. Emmert*, 41 Ill. 319, 323 (1866); c. 7, Hurd's Stat. 1909, p. 154.

¹⁵ *Porter v. Leache*, 56 Mich. 40, 41 (1885).

¹⁶ *Toledo, Wabash & Western Ry. Co. v. McLaughlin*, 63 Ill. 389, 391 (1872); *Weld v. Hubbard*, 11 Ill. 573, 574 (1850); *Brockman v. McDonald*, 16 Ill. 112 (1854).

¹⁷ *Greer v. Young*, 120 Ill. 184, 191 (1887); *Holloway v. Freeman*, 22 Ill. 197, 203; *McNab v. Bennett*, 66 Ill. 157, 159 (1872).

¹⁸ *Pitts Sons' Mfg. Co. v. Commercial National Bank*, 121 Ill. 582, 587 (1887); *Waterman v. Tuttle*, 18 Ill. 292, 293 (1857).

¹⁹ *Pitts Sons' Mfg. Co. v. Commercial National Bank*, *supra*.

issue or fact; but any defect in the writ, its service or return which is apparent from an inspection of the record, may properly be taken advantage of by motion.²⁰ A motion to dismiss for want of jurisdiction is proper where the objections appear on the face of the pleadings; this defense must be urged by plea in abatement where the objections are *dehors* the record.²¹ The omission to make necessary parties may be urged without a plea in abatement when the want of these parties appears on the face of the declaration or pleading.²² Matters *dehors* the return must be raised by plea and not by motion.²³

557 Requisites

Great accuracy and precision are necessary in the structure and form of pleas in abatement.²⁴ They must specify truly the parties in the cause.²⁵ They must aver enough facts to give the plaintiff a better writ; and they must show how another action against the defendant might be brought in case the plea should prove to be true.²⁶ A plea in abatement must be positive and certain, and not argumentative.²⁷ Certainty to every intent is essential.²⁸ That is regarded certain which may be rendered certain.²⁹ The subject matter of a plea in abatement must be matter of abatement, and not matter in bar of the action.³⁰ The plea in abatement must conclude by praying judgment of the writ and that the same may be quashed; or if the writ abates *de facto*, by praying judgment if the court will further proceed.³¹ All pleas in abatement must conclude with the prayer that the suit shall abate.³² A plea in abatement must be signed by counsel.³³

²⁰ Willard v. Zehr, 215 Ill. 148, 155 (1905); Holloway v. Freeman, *supra*; Greer v. Young, 120 Ill. 184, 191.

²¹ McNab v. Bennett, 66 Ill. 157, 159.

²² Powell v. People, 214 Ill. 475, 479 (1905); Cummings v. People, 50 Ill. 132, 135 (1869); Leftwich v. Berkeley, 1 Hen. & Munf. 61, 66 (1806); Newell v. Wood, 1 Munf. 555 (1810).

²³ Putnam Lumber Co. v. Ellis-Young Co., 50 Fla. 251, 260 (1905).

²⁴ Willard v. Zehr, 215 Ill. 148, 155, 156.

²⁵ Holloway v. Freeman, 22 Ill. 197, 202.

²⁶ American Express Co. v. Haggard, 37 Ill. 465, 472 (1865).

²⁷ Locomotive Fireman v. Cramer, 164 Ill. 9, 13 (1896).

²⁸ Wales v. Jones, 1 Mich. 254, 256 (1849); Pitts Sons' Mfg. Co. v. Commercial National Bank, 121 Ill. 582, 587.

²⁹ Parsons v. Case, 45 Ill. 296, 297 (1867).

³⁰ Pitts Sons' Mfg. Co. v. Commercial National Bank, 121 Ill. 588.

³¹ Ross v. Nesbit, 2 Gilm. 252, 257 (1845).

³² Chicago & Northwestern Ry. Co. v. Jenkins, 103 Ill. 588, 593 (1882).

³³ Holloway v. Freeman, 22 Ill. 197, 203.

558 Verification; power of attorney, necessity

A plea in abatement by a corporation verified by an agent or attorney must be supported by a power of attorney from the corporation authorizing the verification; which power may be filed with the plea or afterwards.³⁴

559 Verification; power of attorney, form

Know all men by these presents, that the has made, constituted and appointed, and by these presents does make, constitute and appoint of the city of its true and lawful attorney for it and in its name and on its behalf to make, execute and file a plea of abatement to the writ of attachment and the garnishee process issued out of the court of county in the state of in a certain suit of attachment now pending in said court wherein and are plaintiffs and the is defendant, and to make and file any other paper in its name he may deem necessary in said cause; hereby ratifying and confirming whatever its said attorney may lawfully do in the premises.

Witness the by its president and its corporate seal by its the day of, 19..

By
its

(Corporate seal)

560 Verification, necessity and requisites

The truth of a plea in abatement, except as hereinafter noted, or of any other dilatory plea, must be verified by affidavit or by some other evidence.³⁵ An affidavit verifying a plea in abatement must state that the plea is true in substance and in fact, and not to the best knowledge and belief.³⁶ An unverified, or improperly verified, plea in abatement may be rejected or stricken from the files on motion.³⁷ An affidavit which is on the same paper as the plea in abatement need not restate the title when the plea itself contains a complete title of the case.³⁸

³⁴ See *Union National Bank v. First National Bank*, 90 Ill. 56 (1878).

³⁵ (10070), C. L. 1897 (Mich.); *Ross v. Nesbit*, *supra*; *Ryan v. Lander*, 89 Ill. 554 (1878).

³⁶ *Spencer v. Aetna Indemnity Co.*, 231 Ill. 82, 83, 84 (1907).

³⁷ *Spencer v. Aetna Indemnity Co.*, *supra*.

³⁸ *Cook v. Yarwood*, 41 Ill. 115, 118 (1866).

561 Verification, forms (District of Columbia)

39 being duly sworn, on oath deposes and says that she has read the foregoing motion by her subscribed and knows the contents thereof, and that the matters and facts therein set forth are true.

Subscribed and sworn to at the city of District of Columbia, before me, a notary public duly commissioned in and for said District of Columbia, this day of, 19..

.....
Notary Public, D. C.

(Notarial seal)

(Illinois)

..... the defendant in this cause makes oath and says that the plea hereto annexed is true in substance and in fact.

Subscribed, etc.

(Maryland)

State of Maryland, city of, to wit:

I hereby certify, that on this day of, 19..., before me, the subscriber, a justice of the peace of said state in and for said, personally appeared and made oath in due form of law on the Holy Evangelry of Almighty God, that the above plea is true in substance and in fact.

(Virginia)

I, a notary public in and for the said city and county certify that personally appeared before me in said city and made oath that he is the (president, or vice president) of the railway company, the defendant in the plea hereto attached in the suit of v., and that he verily believes the said plea to be true.

Given under my hand and notarial seal this day of, 19..

.....
Notary Public.

³⁹ See Section 211, Note 60.

(West Virginia)

....., the defendant named in the foregoing plea, being duly sworn, says that the facts and allegations therein contained are true, except so far as they are therein stated to be on information, and that so far as they are therein stated to be upon information, she believes them to be true.

Taken, sworn to and subscribed before me this day of, 19..

Notary public in and for county, West Virginia.
(Notarial seal)

562 Amendment

A plea in abatement is not amendable,⁴⁰ except a plea in abatement to the jurisdiction over the person.⁴¹ Nor is it permissible to plead in abatement a second time upon the disposition of a previous similar plea.⁴²

563 Judgment, defendant

On an issue of fact or law, a judgment for the defendant must be that the writ shall be quashed; or if a temporary disability or privilege is pleaded, that the plaint remain without day until, etc.⁴³ In rendering judgment for the defendant on a plea in abatement, the trial court has no discretion.⁴⁴ And the error is not of a character that a defendant might waive.⁴⁵ At common law, no costs can be awarded a defendant on an issue of law.⁴⁶

564 Judgment, plaintiff

On sustaining a demurrer to a plea in abatement or to a replication, and a finding for the plaintiff, the judgment should be *quod respondeat ouster*.⁴⁷ Upon the trial of an issue of fact raised by a plea in abatement and finding for the plaintiff, the judgment should be *quod recuperet*.⁴⁸ So, should there be a

⁴⁰ Cook v. Yarwood, *supra*; Sec. 11, c. 7, Hurd's Stat. 1909, p. 155.

⁴¹ Spencer v. Aetna Indemnity Co., *supra*.

⁴² Cook v. Yarwood, *supra*.

⁴³ McKinstry v. Pennoyer, 1 Seam. 319, 320 (1836); Cushman v. Savage, 20 Ill. 330 (1858); Scott v. Waller, 65 Ill. 181, 184 (1872); Campbell v. Hudson, 106 Mich. 523, 528 (1895).

⁴⁴ McKinstry v. Pennoyer, 1 Seam. 320.

⁴⁵ Spaulding v. Lowe, 58 Ill. 96, 97 (1871).

⁴⁶ McKinstry v. Pennoyer, 1 Seam. 320.

⁴⁷ McKinstry v. Pennoper, *supra*; Bradshaw v. Morehouse, 1 Gilm. 395, 396 (1844).

⁴⁸ Italian-Swiss Agricultural Colony v. Pease, 194 Ill. 98, 100

judgment *quod recuperet* upon a issue of fact raised by a plea in abatement for the nonjoinder of defendants, although the only issue joined is upon the abatement of the action.⁴⁹

JURISDICTION OF THE COURT

565 Practice

Under Illinois practice, the want of jurisdiction of a court of general jurisdiction can only be raised by plea in abatement.⁵⁰ In Michigan, it is permissible to interpose an objection to the jurisdiction of the court by motion supported by affidavits.⁵¹

566 Plea, requisites

A plea to the jurisdiction of the court must, by averment of facts accurately and logically stated, exclude every intendment in favor of the jurisdiction of the court of general and unlimited jurisdiction.⁵² The pleader must set up such facts as would clearly oust the court of jurisdiction.⁵³ If a declaration contains causes of action which are within the jurisdiction of the court, and some of which are not, the plea must be to the causes of action of which the court has no jurisdiction.⁵⁴ A plea to the jurisdiction should conclude by praying judgment "whether the court ought to have further consuance of the suit."⁵⁵

JURISDICTION OF THE PERSON

567 Plea, nature

A plea to the jurisdiction of the person, as distinguished from a plea to the jurisdiction of the court, is meritorious in its character and is founded upon statutory right.⁵⁶ A plea claiming the statutory privilege of being sued in the county of one's

(1901); *McKinstry v. Pennoyer*, *supra*; *Greer v. Young*, 120 Ill. 184, 191; *Mineral Point R. Co. v. Keep*, 22 Ill. 9, 19 (1859); *Brown v. Illinois Central Mutual Ins. Co.*, 42 Ill. 366, 369 (1866).

⁴⁹ *Goggin v. O'Donnell*, 62 Ill. 66, 67 (1871).

⁵⁰ *Willard v. Zehr*, 215 Ill. 155.

⁵¹ *Haywood v. Johnson*, 41 Mich. 598, 605 (1879).

⁵² *Humphrey v. Phillips*, 57 Ill. 135.

⁵³ *Willard v. Zehr*, 215 Ill. 155, 156; *Diblee v. Davison*, 25 Ill. 486 (1861); *Dunlap v. Turner*, 64 Ill. 47 (1872).

⁵⁴ *Diblee v. Davison*, 25 Ill. 486.

⁵⁵ *Drake v. Drake*, 83 Ill. 526, 528 (1876).

⁵⁶ *Humphrey v. Phillips*, 57 Ill. 135; *Safford v. Sangamo Ins. Co.*, 88 Ill. 296, 297 (1878); Sec. 6, Practice act 1907; *Drake v. Drake*, 83 Ill. 529.

residence is not a plea to the jurisdiction of the court.⁵⁷ The right to be sued in one's county, however, may be waived by the defendant if not pleaded in apt time.⁵⁸ The objection cannot be raised by demurrer, or upon writ of error, after default.⁵⁹ It cannot be pleaded after the general issue has been interposed.⁶⁰ The filing of an amended declaration which merely restates the cause of action with more particularity than it is stated in the original declaration does not give the right to plead to the jurisdiction of the court where the general issue to the original declaration remains on file.⁶¹

REQUISITES

568 Pleading and signing

A plea to the jurisdiction by an individual should be in person, and not by attorney.⁶² The plea should be in the name of the defendant, without naming himself as such, and it should be signed by him.⁶³ The plea by corporation aggregate must be by attorney alone.⁶⁴

569 Averments, generally

A plea to the jurisdiction must negative every jurisdictional ground enumerated in the statute, although it thereby renders the plea objectionable on the ground of duplicity.⁶⁵

570 Averments, negating appearance

A plea denying service of process must negative a submission to the jurisdiction by appearance or otherwise.⁶⁶

⁵⁷ *Humphrey v. Phillips*, 57 Ill. 136, 137.

⁵⁸ *Humphrey v. Phillips*, *supra*; *Drake v. Drake*, 83 Ill. 528; *Hardy v. Adams*, 48 Ill. 532, 533 (1868); *Wallace v. Cox*, 71 Ill. 548, 549 (1874); *Sandusky v. Sidwell*, 173 Ill. 493 (1898); Sec. 6, Practice act 1907; *Toledo, Wabash & Western Ry. Co. v. Williams*, 77 Ill. 354, 356 (1875) *Mason & Tazewell Special Drainage District v. Griffin*, 134 Ill. 330; *Humphrey v. Phillips*, 57 Ill. 136; *Kenney v. Greer*, 13 Ill. 432, 449, 450 (1851).

⁵⁹ *Wallace v. Cox*, *supra*; *Hardy v. Adams*, 48 Ill. 532, 533 (1868).

⁶⁰ *Toledo, Wabash & Western Ry. Co. v. Beggs*, 85 Ill. 80, 82 (1877).

⁶¹ *Toledo, Wabash & Western Ry. Co. v. Beggs*, *supra*.

⁶² *Mineral Point R. Co. v. Keep*, 22 Ill. 19.

⁶³ *Drake v. Drake*, 83 Ill. 527.

⁶⁴ *Nispel v. Western Union R. Co.*, 64 Ill. 311, 313 (1872).

⁶⁵ *Deatrick v. State Life Ins. Co.*, 107 Va. 602, 610 (1907).

⁶⁶ *Waterbury National Bank v. Reed*, 231 Ill. 246, 250 (1907).

571 Averments, negating jurisdiction

A plea to the jurisdiction of the person should negative the existence of other defendants and the commencement of the suit under the attachment laws of the state, unless these facts affirmatively appear from the record.⁶⁷

572 Averments, proper court

A plea to the jurisdiction of the person need not show what court has jurisdiction, provided the plea does show that the court has no jurisdiction over the defendant or defendants, or either of them.⁶⁸

573 Averments, traversing declaration

If the declaration consists of more than one count, the plea should negative, specifically the cause of action set up in each count.⁶⁹

574 Verification, necessity

It is not necessary, under Illinois practice, that a plea to the jurisdiction of the person should be verified by affidavit.⁷⁰

575 Amendment

A plea to the jurisdiction of the person may be amended in Illinois, notwithstanding the statutory provision against the amendment of a plea in abatement.⁷¹

FORMS

576 Commencement and conclusion

And now the said in his own proper person, comes and says that this court ought not to have or take further cognizance of the aforesaid action, as to the said supposed causes of action, and each and every of them, mentioned in said plaintiff's declaration, because he says:

⁶⁷ *Humphrey v. Phillips*, 57 Ill. 137.

⁶⁸ *Midland Pacific Ry. Co. v. McDermid*, 91 Ill. 170, 174 (1878).

⁶⁹ *Humphrey v. Phillips*, *supra*.

⁷⁰ *Howe v. Thayer*, 24 Ill. 246, 248 (1860); Sec. 1, c. 1, *Hurd's Stat.* 1909; *Drake v. Drake*, 83 Ill. 527, 528.

⁷¹ *Safford v. Sangamo Ins. Co.*, 83 Ill. 296, 297 (1878); *Midland Pacific Ry. Co. v. McDermid*, 91 Ill. 170, 172; *Drake v. Drake*, 83 Ill. 528; Sec. 11, c. 7, *Hurd's Stat.* 1909; Sec. 39, *Practice act* 1907.

Conclusion

Wherefore prays judgment whether this court can, or will, take further cognizance of the aforesaid action.⁷²

577 Nonresidents, individuals

(Commence and conclude as in Section 576) that before and at the time of the commencement of this suit, the said defendant was, and at all times since the commencement of this suit the said defendant has been, and still is, a resident of the county of, in the state of, and did not, at the commencement of the suit, nor does he now reside in said county of; nor has he been found nor served with process in said action in said county of or elsewhere than in said county of

And the defendant further avers that the said plaintiff was not, at the commencement of said action, a resident of said county.

And this defendant is ready to verify; wherefore, etc.⁷³

(Verification as in Section 561)

(Maryland)

And the said in his own proper person, comes and defends the wrong and injury when, &c., and prays judgment of the writ aforesaid, and also of the declaration of the said plaintiff against the said defendant thereon founded, because he says that he now doth, and on the day of the impetration and suing forth the said original writ of summons of the said plaintiff did, and for a long time before had, and ever since hath, inhabited, dwelt and resided in county, and that neither the sheriff nor the coroner of said county, did at any time on or before the day of the impetration and suing forth the said writ of the plaintiff return a *non est* on a summons issued in said county against him, the said nor hath the sheriff, nor the coroner of said county since the day of the impetration and suing forth the said writ of the plaintiff returned a *non est* on a summons issued in said county against him, the said without this, that he, the said on the day of the impetration of the said writ as aforesaid did, or at any time before or since hath, or now doth inhabit, dwell and reside in the of, as the said

⁷² Drake v. Drake, *supra*.

⁷³ Scott v. Waller, 65 Ill. 181 (1872).

plaintiff by his said writ and declaration do above suppose, and without this that the sheriff or the coroner of said county did at any time on or before the day of the impetration and suing forth the said writ as aforesaid, return or hath ever since the said day of the impetration of the said writ returned a *non est* on a summons issued in said county against him, the said and this, he, the said is ready to verify, &c., and the said doth further allege that he did not at the impetration of said writ and does not now, carry on any regular business, nor does h habitually engage in any avocation or employment in the said of

(Verification as in Section 561)

(West Virginia)

(Commence and conclude as in Section 576) that before and at the commencement of the said action of the said, she the said was, and from thence hitherto has been, and still is, residing in the county of, in the said state of West Virginia, and not in the said county of; and that she the said was not found or served with process in the said action in the said county of but was found and served with process in the said action in the said county of: And this she is ready to verify; wherefore, etc.⁷⁴

(Verification as in Section 561)

578 Nonresidents, several defendants

And the said, one of the defendants in the above entitled cause, for the sole purpose of pleading to the jurisdiction of said court, comes and says that this court ought not to have or take cognizance of the said action, because the said supposed cause or causes of action, and each and every one of them arose in the county of, in said state of and not within said county of, and that the said action is not a local action; and that both he and his co-defendant,, at the time said suit was begun, and at all times since, have resided in said county, and not within the said county of; that process was served on the said in said county of and not within the said county of, and was served on this defendant while he was on a public railroad train pass-

⁷⁴ Netter-Oppenheimer & Co. v. Elfant, 63 W. Va. 99 (1907).

ing through the said county of, and not within the said county of where he resides; and this the said defendant is ready to verify; wherefore, etc.⁷⁵

(Verification as in Section 561)

579 Railroad company (Illinois)

(Commence and conclude as in section 576) that the said supposed causes of action, and each of them, if any such, have accrued to the said plaintiff out of the jurisdiction of this court, that is to say, in the county of M, in the state of, and not within the county of H, or elsewhere, within the jurisdiction of this court. And the defendant further avers that the supposed contract or contracts upon which said action was brought, were not, nor were any of them, actually made in said county of H, and the same were not, nor any of them, nor any part thereof, made specifically payable in said county of H. And the defendant further avers, that this defendant is a corporation, duly established and organized, operating a line of railroad from M, in the state of to in the county of R, in the state of; that its president resides in the city of, in the state of; that its directors and other officers reside at different points in said and the state of, and none of such directors or other officers reside in said H county; that the principal office and place of business of this defendant at the time of commencing this suit, was and now is, in the said city of, in the state of; and that this defendant's line of railroad runs through or into the counties of and, and no other county or counties in said state of; that this defendant has officers and agents in each and every of said counties where and upon whom process could have been served at the time of the commencement of this suit; that this defendant at the time of the commencement of this suit, had not, and now has no line or part of line of railroad, in said H county, nor any office, officer, director, agent, employee, or other person in said H county upon whom process should have been, or could now be served; that this defendant has not been served with process in said H county; and that the præcipe in this action directs the summons herein to be issued to the sheriff of C county and such summons was so issued, and finally served on at and in the county of C, he being then and there an agent of this defendant.

And this the defendant is ready to verify; wherefore, etc.⁷⁶

(Verification as in Section 561)

⁷⁵ Sandusky v. Sidwell, 173 Ill. 493 (1898).

⁷⁶ Nispel v. Western Union R. Co., 64 Ill. 311 (1872).

(Virginia) Plea

(Commence and conclude as in Section 576) that it is a domestic railroad corporation, duly incorporated under the laws of the state of Virginia, and that its principal office is not located in the city of, Virginia, but is located in the city of, Virginia; that its chief officer does not reside in the city of, Virginia, but resides in the city of, Virginia; that the said supposed cause of the said action (if such there be), did not nor did any part thereof arise in the said city of, but that the said supposed cause of action, if any such cause there be, did arise in the state of, or in the county of in the state of Virginia or in some other state other than Virginia; that this defendant is not sued with any other person or persons resident in the said city of; and that plaintiff's cause of action, if any he has, is cognizable in the court of the city of, in the state of Virginia, and not here in this court. And this the defendant is ready to verify.

Wherefore, etc.

(Verification as in Section 561)

Replication

And the said plaintiff, by his attorney comes and says that notwithstanding anything by the said defendants in their said pleas alleged, this court ought not to be precluded from taking further cognizance of this action, because, he says, a part of the cause of action aforesaid arose and accrued to the said plaintiff within the jurisdiction of this court, to wit, within the city of aforesaid. And this the said plaintiff prays may be inquired of by the country.

., p. q.

580 Tort actions

(Commence and conclude as in Section 576) that the said supposed causes of action and each and every one of them (if any such have accrued to the said plaintiff) accrued to the said plaintiff out of the jurisdiction of this court, that is to say, at the county of, in the state of, and not within the county of or elsewhere within the jurisdiction of this court; that the said supposed injuries upon which said cause was brought were not, nor were any of them, actually received or done in said county of; that this defendant is a corporation, duly established and organized, operating a coal mine in said county of; that its president and all its officers reside in, in said

county of; that the principal office and place of business of this defendant at the time of the commencement of this suit was, and it now is in said city of; that this defendant's property is situated, and its business is wholly transacted in said county of and in no other county or counties in the said state of; that this defendant has officers and agents in said county of upon whom process could have been served at the time of the commencement of this suit; that this defendant at the time of the commencement of this suit had not, nor has it now, any office, officer, director, agent, employee or other person in said county upon whom process could then have been or can now be served, but defendant further says that one of its officers, one, who is its vice-president and secretary and who resides in in said county of while casually in the county of in the pursuit of his own private affairs and not engaged in any business of the defendant, nor by it authorized to accept service in this or any other suit that might be brought against it, was served in said county of on the day of, 19.., by the sheriff of said county; that there was at the time of the commencement of this suit, and now is, a circuit court within and for said county of, which said court had and now has jurisdiction of the defendant, and which said court might lawfully have and take cognizance of the said supposed causes of action mentioned in said plaintiff's declaration; and this the defendant is ready to verify. Wherefore, etc.

(Verification)

Replication

And now comes the plaintiff and as to the plea of the said defendant says that he, the plaintiff, by reason of anything in said plea alleged ought not to be barred from having his aforesaid action because he says that at the time of the commencement of this suit the said defendant's property was not wholly situated or its business wholly transacted in the said county of state of

And because the plaintiff further says that at the time of the commencement of this suit the said defendant did have property situated in said county of and did by its officers, agents and servants transact business in said county of and did then have an officer, agent and employee in said county of upon whom process could be legally served, to wit, one M. (Conclude to the country)

581 Witness' privilege

To the honorable, the judges of said court.

The motion of, named as the defendant in the above entitled cause, and appearing specially in this case by

....., solely for the purpose of this motion and for no other purpose whatsoever, and reserving her right to exemption from appearing and answering this case and all other rights whatsoever, respectfully shows:

1. That she is now and has been for the past years a resident of the District of Columbia, and is not a resident of the state of Maryland.

2. That on, the day of, 19..., there was on trial in the circuit court of county, in the state of Maryland, a case of assumpsit, in which executor of the estate of, deceased, was plaintiff, and the said was defendant, which suit had been instituted in this honorable court and had been transferred hence to county, and thence to the said circuit court of county.

3. That on said day of, 19..., said left her home in the District of Columbia and went directly therefrom to the court house at city, county, Maryland, for the sole purpose of attending at that court as party defendant and testifying as a witness at the trial of said cause.

4. That on the day of, 19..., at about o'clock, p. m., of that day while the said circuit court of county was actually in the trial of the said cause and while she, the said, was in the actual presence of the said court as such party defendant and witness, and while she was sitting within a few feet of her attorneys who were engaged in the conduct on her behalf of the trial of said case, and waiting to be called and sworn to testify as a witness in such cause, and within minutes of the time when she actually did take the stand and testified as a witness in said cause, and while within the state of Maryland, and in attendance upon said court for this and for no other purpose, the summons in this case was illegally served upon her, the said in violation of her rights and privileges as a party defendant and a witness in said cause.

5. Said was present in the state of Maryland and in the said circuit court, at the time and in the place where it was attempted to serve said summons in this case upon her, for the purpose of testifying in the said cause then and there on trial and for no other purpose whatsoever.

6. That said is partially deaf and that she did not know the sheriff of county, and that because court was actually in session in the room where said summons was so illegally served upon her, said sheriff addressed her in a whisper and said was compelled to call the attention of her counsel to the fact that she was being so addressed; that said counsel was actively engaged in connection with the trial of said cause and having answered said sheriff that the

woman he was addressing was gave no more attention at the time to said sheriff's mission, and said did not know that she had been so illegally served with a summons to appear in this court at, as a party defendant in a suit which said was in this manner endeavoring to institute against her until her said attorney returned to the District of Columbia late in the afternoon of, the day of, 19.., this defendant having left said court and having left city and the state of Maryland before the jury in the cause, the trial of which she had attended, had returned to the court room with its verdict.

Wherefore, the premises considered, the said asserts that as such service was illegally made upon her in violation of her rights and privileges as a witness, and as a party defendant, attending the trial of the case above mentioned, the same is null and void, and she moves this honorable court to quash said summons and the return of the sheriff thereon, and to order the plaintiff to pay the costs in this case.

.....
Attorney appearing specially as above set forth.⁷⁷

(Verification as in Section 561)

Answer

To the honorable judges of said court.

This answer of, executor, to the motion of the defendant, to quash the summons and return in this case respectfully shows:

1. In answer to the first paragraph of said motion, the plaintiff admits the allegations of the same.

2. The plaintiff admits the allegations of the second paragraph of the same.

3. The plaintiff neither admits nor denies the allegations of the third paragraph of the same, except that the plaintiff denies that said defendant was at said trial on, 19.., for the purpose of testifying as a witness.

4. That the plaintiff admits that on the day of, 19.., at about o'clock, p. m. of that day, while said court of county was actually in the trial of the said cause and while she the said, was in the actual presence of said court as party defendant the said summons in this case was served on her, but the plaintiff denies all the other allegations of paragraph four and especially that the said was attending said court as a witness.

5. The plaintiff again denies the allegations of the fifth

⁷⁷ Long v. Hawken, 79 Atl. 190 (Md. 1911).

paragraph and says that the defendant was not present at the said trial for the purpose of testifying in said cause and for no other purpose whatever.

6. The plaintiff denies all the allegations of paragraph six of said motion, and in further answer to said paragraph says that on, 19, the sheriff of county, Maryland, served the summons in this case on the defendant; that when said sheriff proceeded to serve said summons he approached said defendant and told her who he was and read to her in full the contents of said summons; that when he approached her to serve said summons she was sitting on a chair and he came up behind her and leaned over to her and spoke to her when she turned partly around on her chair, and then that the relative positions thus occupied by said defendant and the said sheriff, brought the sheriff's mouth near to the ear of the defendant and put the summons as nearly to her eyes as to the eyes of the sheriff, and that the sheriff so held the summons while he read it to the defendant, and that while he was reading it to her she was also looking at the summons; that he read it to her in a voice considerably above a whisper and that she appeared to him to be both hearing what he was reading and reading the summons herself; that she did not tell him, nor in any other way indicate to him, that she did not hear or understand what he was reading but on the contrary, she listened attentively until he had fully completed reading the summons, when she, the defendant, called one, her attorney, and the said then and there while in the presence of said took the summons in his own hand and read it and then handed it back to the said sheriff of county; that in about a from the time he so served said summons on said 19, the said went over to where the said sheriff was sitting at his desk in the court room and said, sheriff let me see that summons again, and that the sheriff again gave it to the said who again looked at it, and that the said did not thereafter at any time ask the sheriff to see said summons.

7. And in further answer to said motion the plaintiff says, that said case on trial at said time in said county court was brought to recover the identical sum of money sought to be recovered in the present case, as well as a certain other sum sued for and recovered in said case so tried in court; that the sum sought to be recovered in this case and which was, as above stated, sought to be recovered in said trial in said case tried in county, is upon a paper writing, which paper writing was in the possession of the defendant, and which she refused at the time said suit tried in county was instituted to deliver up to the plaintiff or to tell the plaintiff whether said paper writing was a simple promissory

note or a writing obligatory; that the plaintiff, at the time said suit tried in county was instituted, did not know whether said paper writing was under seal and therefore sued in assumpsit; that at said trial when said paper writing was produced it was discovered that it was under seal and therefore the recovery of said sum due on said paper writing in said trial in the county court aforesaid was abandoned and this pending suit is an action in debt to recover said sum of money; that this suit is to recover the same sum of money sought to be recovered in said suit in county, in which the defendant does not deny that she was legally summoned, and as the suit in county had to be abandoned as to that sum of money now sought to be recovered in this suit because of knowledge in the defendant's possession, which knowledge she wrongfully refused to impart to the plaintiff and which paper writing she wrongfully withheld from the plaintiff, she ought not to be heard to complain in the premises, and the plaintiff asks that her said motion be dismissed.

Respectfully submitted,

.....

Attorneys for plaintiff.

State of Maryland,

..... county, to wit:

I hereby certify that on this day of, 19.., before me, the subscriber, a notary public of the state of Maryland, in and for county, personally appeared, executor, plaintiff in the above entitled cause, and made oath in due form of law that the matters and facts set forth in the foregoing writing and answer are true as therein set forth to the best of his knowledge, information and belief.

In testimony whereof I have hereunto set my hand and affixed my notarial seal this day of, 19..

.....

Notary Public.

Order

Upon the application of attorney for named as defendant in the above entitled cause, it is ordered this day of, 19.., by the court for county, that the motion filed in said cause by to quash the summons therein and the return thereon be and the same is hereby set down for hearing on the day of, 19.., at o'clock .. m. with leave to both parties to take such testimony at the hearing as they may desire; provided that a copy of this order be served on the said or his attorney, on or before the day of, 19..

ABATEMENT OF THE WRIT

582 Nature of plea

A plea in abatement of the writ is meritorious, and is not regarded with the same strictness as is a plea to the jurisdiction of the court.⁷⁸

583 Requisites of plea generally

A plea in abatement must give a better writ or declaration.⁷⁹ But this requirement has no application to a plea which shows a condition of facts under which no court in the state has jurisdiction.⁸⁰ A plea in abatement to the writ by a corporation must be signed by its attorney.⁸¹

584 False return, waiver, plea, practice

At common law the remedy for a false return is by an action against the officer who made the return.⁸² In Illinois the return of an officer, on original process, is merely *prima facie* evidence of matters therein stated, and it may be put in issue, before judgment, by plea in abatement.⁸³ A default which has been entered upon a false return may be set aside on motion promptly made.⁸⁴ After judgment, except in cases of default, a false return is not impeachable.⁸⁵ The defense of false return of process is waivable by a domestic or a foreign corporation;⁸⁶ and if the defense is sought to be interposed, it should be done by plea in abatement, and not by motion.⁸⁷

585 False return, plea, requisites

Under the present statute of Illinois, a plea in abatement which raises an issue on the right to serve any other person than

⁷⁸ *Humphrey v. Phillips*, 57 Ill. 135; *Campbell v. Hudson*, 106 Mich. 523, 527 (1895); *Italian-Swiss Agricultural Colony v. Pease*, 194 Ill. 98, 100 (1901).

⁷⁹ *Chicago & Pacific R. Co. v. Munger*, 78 Ill. 300, 301 (1875); *Locomotive Firemen v. Cramer*, 60 Ill. App. 212; affirmed 164 Ill. 9.

⁸⁰ *Deatrick v. State Life Ins. Co.*, 107 Va. 611, 612.

⁸¹ *Locomotive Firemen v. Cramer*, 164 Ill. 14.

⁸² *Sibert v. Thorp*, 77 Ill. 43, 44 (1875); *Ryan v. Lander*, 89 Ill. 554 (1878).

⁸³ *Sibert v. Thorp*, 77 Ill. 46; *Waterbury National Bank v. Reed*, 231 Ill. 246, 250 (1907).

⁸⁴ *Waterbury National Bank v. Reed*, 231 Ill. 251.

⁸⁵ *Waterbury National Bank v. Reed*, 231 Ill. 250.

⁸⁶ *Mineral Point R. Co. v. Keep*, 22 Ill. 16.

⁸⁷ *Mineral Point R. Co. v. Keep*,

the president of the defendant company, should merely contradict, by proper averments, the return that the president could not be found in the county at the time of service.⁸⁸ Prior to this statute, it was necessary to show that the president of the company did not reside in the county, or that he was absent.⁸⁹ A plea in abatement which attempts to raise the question of service upon a corporation is defective if the plea merely states that the president was in the county at the time the pretended service was made upon another officer of the corporation without showing where the sheriff could have found the president in the county.⁹⁰ The averment in a plea of abatement to the writ by a corporation that summons was not served upon it, is material.⁹¹

586 False return, plea, form

Now comes, attorney in fact for the and limiting his appearance for the sole purpose of filing this plea to the writ or summons herein and return of the sheriff thereon, and for no other purpose whatever, and defends, when, etc., and says that the writ or summons herein was never served on the; and further that the return on the back of said writ or summons of the pretended and alleged service purporting to have been made on the said, on the day of, 19.., is wholly untrue and false; that the said upon whom such pretended and alleged service of said writ or summons was had was not at the time of said alleged and pretended service on the day of, 19.., and has not since that time been and is not now the agent of the said for the purpose of accepting service of summons or for any other purpose as is set forth in the return of the sheriff on the back of said writ or summons; and this the said as attorney in fact for said is ready to verify; wherefore he prays judgment of the said writ or summons and the return thereon by the sheriff, and that the same may be quashed, etc.

.....
Attorney in fact for the company.

22 Ill. 17; Union National Bank v. First National Bank, 90 Ill. 56 (1878).

⁸⁸ Chicago Sectional Electric Underground Co. v. Congdon Brake Shoe Mfg. Co., 111. Ill. 309, 314 (1884); Sec. 8, Practice act 1907.

⁸⁹ St. Louis, Alton & Terre Haute

R. Co. v. Dorsey, 47 Ill. 288, 289 (1868).

⁹⁰ Chicago Sectional Electric Underground Co. v. Congdon Brake Shoe Mfg. Co., 111 Ill. 314, 315.

⁹¹ Locomotive Firemen v. Cramer, 164 Ill. 14.

(Venue)

....., being first duly sworn upon his oath, deposes and says that he is the duly authorized attorney in fact of the company for the purpose of filing the plea hereto annexed; that as such attorney he is authorized and empowered to enter and file the same; and that the plea hereto annexed is true in substance and in fact.

Subscribed, etc.

587 Misjoinder and nonjoinder of parties

The misjoinder or nonjoinder of proper plaintiffs in *ex contractu* actions may be pleaded in abatement, or the objection may be raised under the general issue.⁹² The nonjoinder of publicly known partners is pleadable in abatement, unless the nonjoinder appears on the face of the declaration.⁹³ The nonjoinder of dormant or secret partners cannot be pleaded in abatement where the plaintiff has no notice of their existence.⁹⁴ In *ex delicto* actions brought for the recovery of damages as distinguished from the recovery of specific property, the nonjoinder of one or more joint owners of the property lost or destroyed can be taken advantage of only by plea in abatement.⁹⁵ But the nonjoinder or misjoinder of parties defendant is not available as matter of abatement in actions *ex delicto*, nor can advantage be taken in any other way, except where the liability of a defendant grows out of ownership of real estate held jointly or in common with others, and where the nature of the wrong is such as that it cannot be committed by more than one person and two or more are charged with the offense.⁹⁶

588 Misnomer, waiver, practice

The misnomer of a plaintiff or of a defendant who is the real party in interest and the person intended to be sued, whether he be an individual or a corporation, must be pleaded in abatement: the defense is waived if not so pleaded.⁹⁷ This rule

⁹² *Snell v. DeLand*, 43 Ill. 323, 325, 326 (1867); See. 53. Practice act (1911 Hurd's Stat., p. 1775); *Puschel v. Hoover*, 16, Ill. 340 (1854), overruled: *Cummings v. People*, 50 Ill. 132, 134 (1869); *Brooks v. McIntyre*, 4 Mich. 316, 318 (1856).

⁹³ *Page v. Brant*, 18 Ill. 37, 38

(1856); *Sinsheimer v. Skinner Mfg. Co.*, 165 Ill. 116, 123 (1897).

⁹⁴ *Goggin v. O'Donnell*, 62 Ill. 67.

⁹⁵ *Johnson v. Richardson*, 17 Ill. 302, 304 (1855).

⁹⁶ *Tandrup v. Sampsell*, 234 Ill. 526, 530 (1908).

⁹⁷ *Hermann v. Butler*, 59 Ill. 225,

applies to adults and infants, and also to *ex delicto* actions.⁹⁸ The want of capacity to sue is not the same as misnomer, it is not waived by a failure to plead in abatement, and it may be shown under a plea of *null tiel* corporation.⁹⁹ A mistake in the plaintiff's or the defendant's Christian name must also be pleaded in abatement.¹⁰⁰ A misnomer of the plaintiff cannot be taken advantage of by motion.¹⁰¹

589 Misnomer, plea, requisites

A plea in abatement for misnomer must not use the word "defendant" or "said," or any other word or words that would amount to an admission that the person pleading is the person who is being sued.¹⁰²

590 Misnomer, plea, form (District of Columbia)

Now comes the said, by his attorneys, against whom the said hath filed the declaration by the name of and says that he is named and called by the name of and by that name and surname hath always been hitherto called and known; without this, that he, the said now is, or ever was, named or called, or known by the name of as in the said declaration supposed. And this he, the said, is ready to verify. Wherefore, he prays judgment of the said declaration and that the same may be quashed.

By
his attorney.

(Venue)

., being duly sworn upon oath deposes and says that he is the attorney for, sued as, and that the plea annexed hereto is true in substance and in fact.

.

Subscribed, etc.

227 (1871); <i>African M. E. Church v. McGruder</i> , 73 Ill. 516 (1874); <i>Pennsylvania Co. v. Sloan</i> , 125 Ill. 72, 77 (1888); <i>People v. O'Connor</i> , 239 Ill. 272, 277 (1909).	⁹⁹ <i>Marsh v. Astoria Lodge</i> , 27 Ill. 421, 425 (1862).
⁹⁸ <i>Pond v. Ennis</i> , 69 Ill. 341, 344 (1873); <i>Guinard v. Heysinger</i> , 15 Ill. 288, 289 (1853); <i>First National Bank v. Jagers</i> , 31 Md. 38, 47 (1869); <i>Chicago & Alton R. Co. v. Heinrich</i> , 157 Ill. 388, 393 (1895).	¹⁰⁰ <i>Salisbury v. Gillett</i> , 2 Seam. 290, 291 (1840); <i>Davis v. Taylor</i> , 41 Ill. 405, 408 (1866).
	¹⁰¹ <i>Watson v. Watson</i> , 47 Mich. 427, 429 (1882).
	¹⁰² <i>Feasler v. Schriever</i> , 68 Ill. 322, 323 (1873).

591 Misnomer, replication

It is appropriate to reply to a plea of misnomer that the party is known as well by one name as by another, even where the Christian or given name is made up of initials alone.¹⁰³

592 Nul tiel corporation, defendant, practice

A plea denying that the *plaintiff* is now or ever has been a corporation is a plea in bar, as the sustaining of such a plea defeats the action; but a plea denying that the *defendant* is now or ever has been a corporation is a plea in abatement, because it must give the plaintiff a better writ by pointing out to him the defendant's true character.¹⁰⁴ A plea in abatement is therefore appropriate to raise the question whether the defendant is a corporation.¹⁰⁵ A plea *nul tiel* corporation defendant must be pleaded separately and before pleading to the merits. Such a plea cannot be pleaded with the general issue.¹⁰⁶ This class of pleas must give the plaintiff a better writ by pointing out to him its true character.¹⁰⁷

593 Variance, motion, nature

A motion to dismiss the suit on account of variance between the writ and the declaration is in the nature of a plea in abatement,¹⁰⁸ and is appropriate if the defect appears on the face of the papers.¹⁰⁹

594 Variance, plea, form

The defendant, by its attorneys, comes and craves oyer of the writ in this cause, and it is read to him in these words, to wit: (Set forth writ); which being read and heard, the said defendant prays judgment of the said writ and declaration, and says that there is a variance between the said writ and the declaration, herein in this particular, that is to say, in the said writ, it is said that the sheriff of county is commanded to summon, a director of of Virginia, to answer and, partners, trading as

¹⁰³ Lucas v. Farrington, 21 Ill. 31, 32 (1858).

¹⁰⁴ Keokuk & Hamilton Bridge Co. v. Wetzel, 228 Ill. 253, 255 (1907).

¹⁰⁵ American Express Co. v. Haggard, 37 Ill. 465, 470 (1865).

¹⁰⁶ Keokuk & Hamilton Bridge Co. v. Wetzel, 228 Ill. 255.

¹⁰⁷ Keokuk & Hamilton Bridge Co. v. Wetzel, *supra*.

¹⁰⁸ Schoonhoven v. Gott, 20 Ill. 48.

¹⁰⁹ Windett v. Hamilton, 52 Ill. 180, 183 (1869).

....., for the benefit of, of a plea of trespass on the case, in assumpsit damages dollars, and in the said declaration founded upon said writ, it is complained that the of Virginia, a corporation, the said defendant mentioned in said declaration, has not kept with the said plaintiff the agreement as specified in said declaration, but has broken the same, to the damage of the plaintiff the sum of dollars. Therefore, because there is a manifest variance between the writ aforesaid and the said declaration, in the particular aforesaid, the said defendant prays judgment of the writ and declaration aforesaid, and that the same be quashed.¹¹⁰

COUNT OR DECLARATION

593 Law and rules governing

Michigan Rule 24 limiting pleading in abatement to a certain time has no application to suits commenced by declaration.¹¹¹

596 Abatement by death; non surviving action, plea

And, administratrix of the estate of, deceased, comes and defends, etc., when, etc., and prays judgment of the writ and declaration aforesaid, because he says that subsequent to the alleged wrongs and injuries in said declaration mentioned, to wit, on, 19... the said departed this life at in said county and state; and he further says that the alleged causes of action in said declaration mentioned do not survive the death of the said; and this the said administratrix is ready to verify; wherefore he prays judgment of the said writ and declaration thereon founded and that the same may be quashed, etc.¹¹²

Administratrix of the estate of, deceased.

(Verification)

597 Abatement by statute, petition

The defendants, and, executors of deceased, move the court that the above entitled suit be declared to be abated and dismissed, and that judgment be entered for defendants for the following reasons:

¹¹⁰ Smith & Marsh v. Northern Neck Mut. Fire Ass'n, 70 S. E. 482 (Va. 1911).

¹¹¹ Hake v. Kent Circuit Judge, 99 Mich. 216, 217 (1894).

¹¹² Jones v. Barnum, 217 Ill. 381.

That this is a suit by a creditor of a corporation to enforce the liability of one of its stockholders therein; and that chapter 225 of Acts of 1907 of the General Assembly of Maryland provides that the exclusive remedy for the enforcement of such claims shall be by bill in equity, and that said law by its terms became operative as of July 1st, 1907, and further declared that it shall cause the abatement of all actions at law, which should have been brought against stockholders since that date and that this suit was brought subsequent to July 1st, 1907, and in fact, was brought more than after the passage of the above-named chapter 225 of the Acts of Assembly of 1907, and after said statute had been in full force and effect, and said action should, therefore, be declared abated.

Wherefore the defendants pray judgment in their favor.¹¹²

Attorney for Defendants

Order

Ordered by the court of this day of 19 . . . that the above motion to abate be granted, and that this suit be and is hereby abated and dismissed, with costs to the defendants.

592 Bankruptcy, waiver, pleading

The defense of bankruptcy is waivable,¹¹³ and if a discharge in bankruptcy is sought to be availed of, it must be specially pleaded.¹¹⁴ A plea of the plaintiff's bankruptcy is in the nature of a plea in abatement and must conclude as such.¹¹⁵

599 Bankruptcy, motion

Now comes the above named defendant and moves the court for an order staying the proceedings in the above entitled cause:

This motion is based upon an act of Congress, entitled "An act to establish a uniform system of bankruptcy throughout the United States," enacted July 1st, 1898, as amended; and also upon a certified copy of an order of adjudication adjudging the above named defendant a bankrupt, which said order was made upon the day of, 19 . . . in a matter pending in the district court of the United States for the district of Michigan, division in bank-

¹¹² Bettendorf Axle Co. v. Field,
114 Md. 487 (1911).

¹¹³ Taber v. Donovan, 156 Mich.
652, 658 (1909).

¹¹⁴ Byers v. First National Bank,
85 Ill. 425.

¹¹⁵ Chicago & Northwestern Ry.
Co. v. Jenkins, 103 Ill. 593.

ruptcy, entitled "In the matter of the petition of to be adjudged a bankrupt," hereto annexed; and upon the files and records in this cause.

Dated, etc.

(Attach certified copy of order of adjudication and reference; also notice of the motion and affidavit of service.)

600 Bankruptcy, petition

To the circuit court for the county of

Your petitioner,, respectfully represents:

1. That he is the defendant in the above entitled cause.

2. That on the day of, 19.., he filed a petition in bankruptcy in the United States district court, for the district of Michigan, division, and on the day of, 19.., he was adjudicated bankrupt by said court.

3. That the claim set up by the plaintiff in this cause, is one from which he is entitled to a release in bankruptcy if a final discharge be granted him by the United States district court.

He therefore prays that an order be entered by this court staying all proceedings in this cause until the final determination of the bankruptcy proceedings in said United States district court.

This motion is based on the files and records of this court, and of the affidavit of hereto attached.

.....
By
his attorney.

(Venue)

....., being duly sworn, says that he is attorney for the defendant in the above entitled cause, that on the day of, 19.., he filed for said defendant, a petition in bankruptcy in the United States district court for the district of Michigan, division. That among the claims listed by said bankrupt, for which he asked a discharge in bankruptcy, was the claim of the plaintiff in this cause. That on the day of, 19.., the said defendant was adjudicated a bankrupt.

Subscribed, etc.

Order

In the above cause it appearing from the petition filed by said defendant that he has filed a petition in bankruptcy in the United States district court for the district of Michigan, division, and that the claim of the said plaintiff in this suit is listed in the claims from which the

said defendant asks a discharge in bankruptcy, and the said proceedings in bankruptcy being still pending;

It is therefore ordered that all proceedings in this cause be and they are hereby stayed until the final determination of the bankruptcy proceedings in the said United States district court.

.....
Circuit Judge.

Notice

To, attorney for plaintiff.

Please take notice that the said defendant will, on the trial of this cause insist upon and give in evidence, under the plea of the general issue by him heretofore pleaded in this cause, that after the said plea was by him pleaded, and before this day, to wit, on the day of, 19.., a petition in bankruptcy was filed in the United States district court for the district of Michigan, division, by the said defendant, and that the claim of the plaintiff in this case, was one of the debts listed by the said defendant in said petition, and from which he asked a discharge in bankruptcy.

That on the day of, 19.., a final order was entered in said bankruptcy proceeding, discharging the said petitioner, the defendant in this case, from all debts provable under the Bankruptcy acts, including the claim of the plaintiff in this suit: all of which the said defendant will give in evidence on the trial of this cause, as aforesaid, and insist upon in his defense; wherefore the said plaintiff ought not further to maintain his said action against the said defendant.

Dated, etc.

601 Bankruptcy, plea

And for a further plea in this behalf, the defendant says that after making the several supposed promises in the said amended declaration and each count thereof mentioned, and before the commencement of this suit, to wit, on the day of, 19.., the district court of the United States of America for the district of, granted to the defendant a certain discharge in these words and figures, to wit: (Insert certified copy of discharge.)

And the defendant further says that the said supposed causes of action in said declaration mentioned are in respect of debts and claims, and each of them is in respect of a debt and claim by the said act of Congress made provable against the estate of the defendant, which existed on the said day of 19.., and that the said supposed causes of action are not, nor is any one of them in respect of any such debts or debt, as are or is by the said act excepted from the operation of a discharge in bankruptcy.

Wherefore, etc.

602 Bankruptcy; plea puis darrein continuance

And now this day, to wit, the day of, 19.., until which day this said cause was continued, comes the defendant, by his attorney, by leave of court first had and obtained in this behalf, and for a further plea herein says: that the plaintiffs ought not further to have or maintain their aforesaid action against him, the defendant, because he says that after the last pleading in this cause, to wit, on the day of, 19.., and before this day, to wit, on the day of, 19.., this defendant was, and had been continuously during the six months next immediately preceeding said day of, 19.., a natural person and an actual resident of the county of, and state of in the district of division thereof; that on the last day and date mentioned aforesaid this defendant was, under the acts of Congress of 1898 relating to bankruptcy and as amended February 5, 1903, duly adjudicated a voluntary bankrupt by and in the district court of the United States of America for the district of division; that afterwards, to wit, on the day of, 19.., the said district court of the United States of America for the district of division thereof, granted to this defendant a certain discharge in these words and figures, to wit: (Insert copy of discharge.)

And the defendant further says that the several supposed promises, undertakings and causes of action in said declaration mentioned are in respect of debts and claims, and each of them is in respect of a debt and claim by the said acts of Congress as amended made provable against the estate of this defendant, and which existed on the said day of, 19.., and the said supposed causes of action are not, nor are any, nor is any one or either of them in respect of any such debt or debts as are or is by the said acts exempt from the operations of and discharge in bankruptcy. Wherefore, etc.

(Verification)

Replication

Procludi non, because they say that the debt upon which the cause of action in said declaration mentioned is based was created by fraud, misrepresentation and false pretenses of the defendant in that the defendant did, on or about the day of, 19.., falsely and fraudulently represent in writing to the plaintiffs that he was the owner of, and had in his possession on his farm in township, county, (Describe property) and that they were of sufficient value to secure an indebtedness of \$....; that

the plaintiffs then and there, relying upon his said representations, gave him credit for said sum and then and there released and parted with the lien of a certain chattel mortgage securing the payment to the plaintiffs of \$....., and took for security for the debt herein sued upon a certain other chattel mortgage upon the same (Describe property) above described; that the said representations so made in writing as aforesaid by the defendant were false and fraudulent and then and there known to the defendant to be so, and at that time said defendant was not the owner of (Describe property), or any part thereof, and did not possess the same at the place aforesaid; that the defendant, well knowing that his said representations were false and fraudulent, executed then and there a certain chattel mortgage conveying to the plaintiffs the said supposed (Describe property) aforesaid, for the purpose of securing the payment of a certain note by him then and there executed, in the sum of \$....., and he then and there delivered said chattel mortgage and said note to these plaintiffs and thereby obtained from them a credit of the sum of \$....., and also procured the release by the plaintiffs of a certain other chattel mortgage on certain cattle securing to the plaintiffs the payment of \$.....; and that the defendant then and there, at the time of making said false and fraudulent representations and executing said chattel mortgage and note, well knew that he did not own (Describe property), or any part thereof, and he made said false and fraudulent representations then and there with the intent to defraud the plaintiffs of the said debt and sum of \$..... with interest thereon, which said debt is the same debt declared upon in the declaration herein; and this, etc.

Rejoinder

And the defendant as to the replication of the plaintiffs to the special plea of the defendant says that the plaintiffs ought not by reason of anything by them in that replication alleged, to further have or maintain their aforesaid action thereof against him, the defendant, because he says that the debt upon which the cause of action in said declaration mentioned is based was not created by fraud, misrepresentation and false pretenses of the defendant; nor did the defendant on or about the day of, 19.., falsely and fraudulently represent in writing to the plaintiffs that he was the owner of, and had in his possession on his farm in township, county,, (Describe property) and that they were of sufficient value to secure an indebtedness of \$.....; nor did said plaintiffs on said date rely upon defendant's representations and give him credit for said sum, and then and there release and part with the lien of a certain chattel mortgage securing the payment to plaintiffs of \$..... and take for security for the debt herein sued upon a

certain other chattel mortgage upon the (Describe property) above described; nor were the representations made in writing by defendant hereinabove mentioned by plaintiffs false and fraudulent and known to be so by the defendant, because he, the defendant, was the owner of (Describe property) at the time and place mentioned in plaintiffs' replication herein; nor did defendant execute and deliver to plaintiffs a chattel mortgage conveying to plaintiffs said (Describe property) for the purpose of securing the payment of a certain note, well knowing that his representations were false and fraudulent, thereby obtaining from said plaintiffs credit in the sum of \$..... and procuring a release by plaintiffs of a certain other chattel mortgage on certain cattle, securing to plaintiffs the payment of \$..... nor did defendant make false and fraudulent representations with the intent to defraud the plaintiffs of said debt and the sum of \$..... with interest thereon; and the defendant denies all and every of the allegations in plaintiffs' said replication as to fraud, misrepresentations and false pretenses: and of this the defendant puts himself upon the country, etc.

.....
Attorney for defendant.

Verdict

We, the jury, find the defendant not guilty on the issue of fraud.

603 Extension of performance, plea, requisites

A plea which relies upon the plaintiff's postponement of performance of a contract must aver the defendant's consent to the same.¹¹⁷

604 Further maintenance of the action, plea, requisites

Any matter that arises after the commencement of a suit and before plea, must be pleaded to the further maintenance of the action; any matter that arises after plea, and before replication, or after issue joined, whether of law or of fact, must be pleaded *puis darrein continuance*.¹¹⁸ A judgment recovered in another state on the same cause of action between the same parties may be set up in bar of the further maintenance of another suit regardless of which suit was first commenced, provided the judgment has been paid; but not other-

¹¹⁷ Hoereth v. Franklin Mill Co., 30 Ill. 151, 158 (1863).

¹¹⁸ Mount v. Scholes, 120 Ill. 394, 399 (1887).

wise.¹¹⁹ Great strictness is required in framing pleas to the further maintenance of the action by reason of their tendency to delay the proceedings. They should be verified by affidavit.¹²⁰

605 Partnership, plea

And the said, in his own proper person, comes and defends, etc., and says that before and at the time of the commencement of the said action of said against him, the said and the said were, and for the purpose of settling up and dissolving their copartnership business still are, copartners and as such were, and still for said purpose are, engaged in the hotel business in the city of; that the said cause of action above specified arose out of and relates to said copartnership business and that said indebtedness, if any exists between said parties, is solely and only related to said copartnership business; and that the said is not indebted to said on any other account whatever, and that the said items of indebtedness, if any exist between said parties, are involved in the partnership accounts of said parties and are of such a nature as can only be fairly adjudicated upon a full accounting between said parties and by a court of equity; and that no such accounting has never been had between said copartners; and that said copartnership business is still unsettled and said copartnership for said purpose is undissolved; and this the said is ready to verify.

Wherefore, the said prays judgment of said writ and that the same may be quashed, etc.¹²¹

Replication

And the plaintiff says that the said writ, by reason of anything by the defendant in his said plea above alleged, ought not to be quashed, because he says that at the time of the commencement of said action, the said and the said were not, and are not now, for the purpose of settling up and dissolving their copartnership business, or for any other purpose, copartners, and are not now, as such copartners, for said purpose, engaged in the business in the city of; and that the said indebtedness is a separate and distinct debt, separate and apart from any partnership relations between the said and the said; that the said indebtedness is not involved in the partnership accounts of the said parties, and is not of such

¹¹⁹ *Lancashire Ins. Co. v. Cramer*, 165 Ill. 600; *Bowne v. Joy*, 9 Johns, 221 (N. Y. 1812); *Gallagher v. Durkin*, 12 Johns 99, 101 (1815).

¹²⁰ *Mount v. Scholes*, *supra*.

¹²¹ *Hartzell v. Murray*, 224 Ill. 377.

a nature as could only be fairly adjudicated upon a full accounting between said parties and by a court of equity; that such accounting between said copartners has been had and that said copartnership business is fully settled and said copartnership is dissolved. (Conclude to the country)

606 Pendency of another suit, pleading discontinuance

The commencement of two suits at the same time, for the same cause of action is deemed to be vexatious, oppressive and a palpable abuse of process, and to mutually abate each other, unless good faith is shown in the commencement of the second suit by discontinuing the first before the defendant is called upon to plead in the second, so that he is not unnecessarily harassed by the defense of the two suits at the same time.¹²² In ordinary actions, a suit pending in one state is not pleadable in abatement of another suit brought in a different state between the same parties on the same cause of action.¹²³ The defense that another suit is pending in the state between the same parties on the same cause of action must be specially pleaded in abatement by verified plea; it is not available under the general issue and notice.¹²⁴ This rule is applicable to the pendency of a garnishment suit under a statutory prohibition against the bringing of another action during such pendency.¹²⁵ A plea of a pending action is a plea in abatement and must be pleaded before any other pleadings, motions or steps taken in the proceeding.¹²⁶ An abatement of a second suit or proceeding may be defeated by replying a discontinuance or a dismissal of the first suit or proceeding after the commencement of the second.¹²⁷

607 Pendency of another suit, plea, requisites

A plea in abatement of another suit pending should set forth the declaration of the first action, or it should refer to it in appropriate manner.¹²⁸ The continued pendency of the first

¹²² *Wales v. Jones*, 1 Mich. 254, 256 (1849).

¹²³ *Lancashire Ins. Co. v. Corbetts*, 165 Ill. 592, 600, 605 (1897); *Allen v. Watt*, 69 Ill. 655, 658 (1873).

¹²⁴ *Muir v. Kalamazoo Corset Co.*, 155 Mich. 624, 628 (1909); *Wilcox v. Kassick*, 2 Mich. 165, 178 (1851);

Near v. Mitchell, 23 Mich. 382, 383 (1871).

¹²⁵ *Near v. Mitchell*, *supra*; (4796). C. L. 1857 (Mich.).

¹²⁶ *Lamb v. Chicago*, 219 Ill. 229, 234 (1906).

¹²⁷ *Lamb v. Chicago*, *supra*.

¹²⁸ *Wales v. Jones*, 1 Mich. 256.

suit must be averred in the plea to show that the second suit is vexatious.¹²⁹

608 Plene administravit

And the said defendants, by, their attorneys, come and defend the wrong and injury, when, etc., and pray judgment of the said writ and declaration, because they say that the defendants fully complied with all the requirements of law in the premises, paid off and satisfied all just and legal claims against the defendants' intestate which were duly filed and presented and passed by the court of county, and that they had no notice or knowledge of the alleged claim, and that they have no assets out of which the same could be paid. (Conclude to the country)

¹²⁹ Wales v. Jones, *supra*.

CHAPTER XVI

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GROUNDS IN GENERAL

609 Averments, omitted or wrong

The omission or the wrong averment of some fact which is material to the cause of action or defense can be taken advantage of only by demurrer.¹ Thus a declaration in assumpsit which shows on its face a want of consideration for the contract constituting the cause of action is subject to a general demurrer.²

610 Defects, nature

A defect is subject to demurrer although it is not assignable as error in a reviewing court.³

¹ Home Ins. Co. v. Favorite, 46 Ill. 263, 267 (1867).

² Schwerdt v. Schwerdt, 235 Ill. 386 (1908).

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³ Beaubien v. Hamilton, 3 Scam. 213, 315 (1841).

611 Departure, nature

A departure in pleading is a matter of substance and ground for general demurrer.⁴

612 Duplicity, practice

A demurrer for duplicity must be special, not general;⁵ and the demurrer must specifically state in what the duplicity consists.⁶ A party waives the right to object on account of duplicity in a pleading by failing to demur specially.⁷

613 Estoppel, practice

Matter which operates as an estoppel may be taken advantage of by demurrer if the matter appears on the face of the pleading.⁸ If the matter of estoppel does not so appear, the proper course is to plead the matter specially.⁹

614 Form of pleading

In Illinois, but not in Florida, a party has a right to interpose a demurrer to question the form of a pleading.¹⁰ A defect in form can be reached only by special demurrer.¹¹ Thus, an improper conclusion to the declaration is reachable by special demurrer.¹²

615 Misstatement of facts, practice

The misstatement of material facts in a pleading cannot be reached by demurrer. The proper practice is to show the true facts by plea.¹³

⁴ *Tillis v. Liverpool & London & Globe Ins. Co.*, 46 Fla. 268, 277 (1903).

⁵ *Franey v. True*, 26 Ill. 184, 186 (1861); *Sims v. Klein, Breese*, 302 (1829); *Armstrong v. Welch*, 30 Ill. 333, 337 (1863); *Wilson v. Gilbert*, 161 Ill. 49, 53 (1896); *Chicago West Division Ry. Co. v. Ingraham*, 131 Ill. 659, 665 (1890).

⁶ *Kipp v. Bell*, 86 Ill. 577, 578 (1877).

⁷ *Wilson v. Gilbert*, 161 Ill. 52.

⁸ *McCarthy v. Alphons Custodis Chimney Construction Co.*, 219 Ill. 616, 623 (1906).

⁹ *Smith v. Whitaker*, 11 Ill. 417 (1849); *McCarthy v. Alphons Custodis Chimney Construction Co.*, 219 Ill. 622.

¹⁰ *Miller v. Blow*, 68 Ill. 304, 308 (1873); *Camp & Bros. v. Hall*, 39 Ill. 535, 568 (1897).

¹¹ *People v. Monroe*, 227 Ill. 604, 612 (1807).

¹² *Winchester v. Rounds*, 55 Ill. 451, 454 (1870).

¹³ *People v. Harrison*, 253 Ill. 625, 630 (1912).

616 Uncertainty, waiver, practice

Uncertainty in a pleading must be challenged by special demurrer;¹⁴ and it is cured by verdict if not so challenged.¹⁵

WAIVER AND ABANDONMENT

617 Waiver, presumption

In Illinois, error in overruling a demurrer is waived by pleading over,¹⁶ or by going to trial of a cause upon the merits, by consent, without joinder in demurrer, and without calling it up for disposition,¹⁷ although no plea be filed in the case.¹⁸ In Virginia, error in overruling a demurrer is not waived by the subsequent pleading of the general issue and going to trial thereon.¹⁹ Rejoining to a replication after a demurrer to it has been overruled waives the demurrer and admits the sufficiency of the replication.²⁰ Error in overruling a demurrer, which is waived by pleading over, may be saved for review by a motion for judgment *non obstante veridicto*.²¹ Substantial defects in a pleading which render it insufficient to sustain a judgment are not waived by pleading over.²² It is, therefore, not necessary to abide by a demurrer to a declaration which states a defective cause of action to avail of the defect on appeal or error. Pleading the general issue to such a declaration does not waive the defect.²³ Pleading to the merits after a demurrer to a plea in abatement has been sustained does not waive the demurrer.²⁴ The mere filing of a plea after a demurrer has

¹⁴ *Brunhild v. Chicago Union Traction Co.*, 239 Ill. 621, 623 (1909).

¹⁵ *Hinchliff v. Rudnik*, 212 Ill. 569, 575 (1904).

¹⁶ *Dickhut v. Durrell*, 11 Ill. 72, 85 (1849); *Nordaus v. Vandalia R. Co.*, 242 Ill. 166, 169 (1909); *People v. Walker Opera House Co.*, 249 Ill. 106, 109 (1911); *Camp v. Small*, 44 Ill. 37, 39 (1867); *Selby v. Hutchinson*, 4 Gilm. 319, 328 (1847); *McPadden v. Fortier*, 20 Ill. 509, 515 (1858); *Finch & Co. v. Zenith Furnace Co.*, 245 Ill. 586, 591 (1910); *Grier v. Gibson*, 36 Ill. 521 (1864); *Heimberger v. Elliot Frog & Switch Co.*, 245 Ill. 448, 452 (1910).

¹⁷ *Hopkins v. Woodward*, 75 Ill. 62, 64 (1874); *Williams v. Baker*, 67 Ill. 238, 240 (1873).

¹⁸ *Devine v. Chicago City Ry. Co.*, 237 Ill. 278, 283 (1908).

¹⁹ *Buck v. Vance*, 112 Va. 28 (1911).

²⁰ *Beer v. Philips*, Breese, 44 (1822); *Wann v. McGoon*, 2 Seam. 74, 77 (1839).

²¹ *Ambler v. Whipple*, 139 Ill. 311, 322 (1891); *Woods v. Hynes*, 1 Seam. 103, 105 (1833).

²² *Chicago & Alton R. Co. v. Clausen*, 173 Ill. 100, 102, 103 (1898).

²³ *Chicago, Rock Island & Pacific Ry. Co. v. People*, 217 Ill. 164, 172 (1905).

²⁴ *Weld v. Hubbard*, 11 Ill. 574 (1850); *Locomotive Firemen v. Cramer*, 164 Ill. 9, 13 (1896); *Bangor Furnace Co. v. Magill*, 108 Ill. 656 (1884), overruled.

been interposed to the same matter does not constitute a waiver of the demurrer by the defendant; nor is there a waiver of the demurrer by plaintiff until he joins issue on the plea.²⁵ A demurrer is not waived if there is a joinder in it. Nor will the waiver of a demurrer be presumed from the mere allegation in the record that issue was joined and parties proceeded to trial before a jury.²⁶

618 Pleading over, allowance

A party may plead over without first withdrawing a demurrer.²⁷ A court has no power to prevent an express waiver of a demurrer to a declaration.²⁸ Under Michigan practice, it is discretionary with the trial court to permit or to refuse a party to plead over after the overruling of his demurrer. The motion or application for leave to plead over must be made promptly and it should be supported by a showing of merits.²⁹

619 Admission

The sufficiency of a pleading is admitted by pleading over after a demurrer to it has been overruled.³⁰ This admission will not prevent a party from making an issue of fact upon some of the allegations of the demurred pleading.³¹ Upon the abandonment of a demurrer to a declaration the plaintiff is put upon proof of the material allegations in it.³²

PRACTICE

620 Defective pleading

A defective pleading cannot be reached by a motion to exclude evidence.³³ A pleading which is defective in part, must be taken advantage of by motion to strike out the irrelevant and foreign matter.³⁴

²⁵ *Edbrooke v. Cooper*, 79 Ill. 582, 583 (1875).

²⁶ *Nye v. Wright*, 2 Scam. 222 (1840).

²⁷ *Nordhaus v. Vandalia R. Co.*, 242 Ill. 166, 169 (1909).

²⁸ *Hull v. Johnston*, 90 Ill. 604, (1878).

²⁹ *Wyckoff, Seamans & Benedict v. Bishop*, 98 Mich. 352, 355 (1894).

³⁰ *Hepler v. People*, 226 Ill. 275, 278 (1907); *Wolf v. Powers*, 241 Ill.

9, 13 (1909); *Indianapolis & St. L. R. Co. v. Morgenstern*, 106 Ill. 216, 221 (1883).

³¹ *People v. Karr*, 244 Ill. 374, 383 (1910); *People v. Gary*, 196 Ill. 310, 319 (1902).

³² *Russell v. Whiteside*, 4 Scam. 7 (1842).

³³ *Rothschild v. Bruseke*, 131 Ill. 265, 271 (1890).

³⁴ *Griffing Bros. Co. v. Winfield*, 53 Fla. 589 (1907).

621 Demurring and pleading

In actions at law, it is not permissible to plead and demur to the same matter at the same time.³⁵ A defendant may demur to one count and plead to another, because separate counts are regarded as several declarations.³⁶ A statute which gives the right to a defendant to plead as many several matters, whether of law or fact, as he shall deem necessary, is limited to him alone, and does not extend to subsequent pleadings or to the plaintiff. To overcome this inconvenience, the practice has been established to first demur, and upon the overruling of the demurrer, to withdraw it and then to plead or answer. The omission to withdraw a demurrer to a plea precludes the plaintiff from answering and entitles the defendant to judgment, unless the parties and the court have treated the demurrer as having been withdrawn.³⁷

622 Time to demur

No demurrer is pleadable after pleading a matter of fact,³⁸ except in Illinois, in a case of a release of errors.³⁹ Nor can a demurrer be interposed after an issue of fact has been made up; and if a demurrer is thus filed, it need not be noticed.⁴⁰

623 Leave of court

Proceeding to trial without a demurrer waives the right to file it without special leave of court; and if a demurrer is improperly filed, it may be stricken out.⁴¹

624 Several demurrers unnecessary

It is good practice, to avoid encumbering the record, to file a general demurrer, where general demurrers are permissible, and to make it several to each of the counts.⁴²

³⁵ *People v. Central Union Tel. Co.*, 192 Ill. 307, 309 (1901).

³⁶ *Roe v. Crutchfield*, 1 Hen. & Munf. 361, 365 (Va. 1807).

³⁷ *Chesapeake & Ohio Ry. Co. v. American Exchange Bank*, 92 Va. 495, 497 (1896); Sec. 3264, Code 1887.

³⁸ *Austin v. Bainter*, 40 Ill. 82, 83 (1866); obviated by Sec. 109, c. 110 Rev. Stat. (Ill.).

³⁹ *Schaeffer v. Ardery*, 238 Ill. 557, 563 (1909).

⁴⁰ *Brush v. Blanchard*, 19 Ill. 31, 34 (1857).

⁴¹ *Cook v. Norwood*, 106 Ill. 558, 562 (1883).

⁴² *Sanford v. Gaddis*, 13 Ill. 329, 336, 337 (1851).

625 Withdrawing demurrer, effect

The granting or the refusing of a motion for leave to withdraw a demurrer and to plead rests in the trial court's discretion.⁴³ A plaintiff may be permitted to withdraw his demurrer to a plea in abatement and to take issue thereon.⁴⁴ The withdrawal of the pleading demurred to, under leave of court, also withdraws the demurrer, even after it has been sustained.⁴⁵

626 Frivolous demurrer, motion for judgment

⁴⁶ And now comes the said plaintiff,, by, its attorney, and moves the court that judgment be entered for the plaintiff on the demurrer of the defendant to said plaintiff's declaration, basing this motion upon the following grounds, viz.: that the defendant's demurrer is frivolous; that said demurrer is not based upon any ground that is apparent upon the face of the declaration in said cause; and that it is in purpose and effect for delay merely. This motion is also founded upon the declaration in said cause.

Dated, etc.

.....
Plaintiff's attorney.

DEMURRER TO DECLARATION

627 Grounds generally

A special demurrer should present every ground that is expected to be relied upon appeal in case the demurrer is overruled; as a reviewing tribunal, in fairness to the trial court, will not pass upon points which were not urged in that court.⁴⁷ All of the objections that are sought to be urged by the special demurrer must be specifically set forth.⁴⁸

628 General averments

An objection to a declaration based upon a generality of averment can only be made available on demurrer; such an objection cannot be raised after verdict.⁴⁹

⁴³ *Harrington v. Stevens*, 26 Ill. 298, 300 (1861).

⁴⁴ *Heslep v. Peters*, 3 Seam. 45, 56 (1841).

⁴⁵ *George v. Bischoff*, 68 Ill. 236, 238 (1873).

⁴⁶ See Section 211, Note 60.

⁴⁷ *Keyston Lumber Yard v. Yazoo & M. V. R. Co.*, 94 Miss. 192 (1908).

⁴⁸ *Read v. Walker*, 52 Ill. 333, 335 (1869).

⁴⁹ *Chenoweth v. Burr*, 242 Ill. 312, 316 (1909).

629 Good and bad counts

A general demurrer is improper to a declaration which contains good and bad counts;⁵⁰ nor to a count which states a distinct good cause of action and also one that is imperfect.⁵¹ Nor is a general demurrer good to an entire count which contains one good assignment of a breach although some of the other counts or assignment of breaches are defective.⁵² Neither is a general demurrer good to a declaration which contains common and special counts.⁵³

630 Insufficient declaration

Insufficiency of a declaration must be urged by demurrer.⁵⁴

631 Measure of damages

The question of the measure of damages or the extent of recovery claimed in a declaration cannot be urged on a general demurrer.⁵⁵

632 Misjoinder of plaintiffs

A misjoinder of plaintiffs, if it appears on the face of the record, must be raised by demurrer.⁵⁶

633 Statute of limitations

The defense of the statute of limitations cannot be made available by demurrer, even where the defense is disclosed by the declaration itself.⁵⁷

634 Useless elements

Useless elements of recovery contained in a count may be reached by motion to strike, but not by demurrer.⁵⁸

⁵⁰ *Bills v. Stanton*, 69 Ill. 51, 53 (1873).

⁵¹ *Lusk v. Cook, Breese*, 84 (1824).

⁵² *Governor v. Ridgway*, 12 Ill. 14, 15 (1850); *Stout v. Whitney*, 12 Ill. 218, 231 (1850); *Brady v. Spurek*, 27 Ill. 478, 482 (1861).

⁵³ *Barber v. Whitney*, 29 Ill. 439 (1862); *Knapp, Stout & Co. v. Ross*, 181 Ill. 392 (1899).

⁵⁴ *Chicago, Burlington & Quincy*

R. Co. v. Harwood, 90 Ill. 425, 427 (1878).

⁵⁵ *Beidler v. Sanitary District*, 211 Ill. 628, 640 (1904); *Tillis v. Liverpool & London Globe Ins. Co.*, *supra*.

⁵⁶ *Galena v. Galena Water Co.*, 229 Ill. 128, 132 (1907).

⁵⁷ *Peterson v. Manhattan Life Ins. Co.*, 244 Ill. 329, 334 (1910).

⁵⁸ *Tillis v. Liverpool & London & Globe Ins. Co.*, 46 Fla. 268, 276.

GENERAL DEMURRER

635 Illinois, single count

And the said defendant , by, h attorney , come and defend , etc., when, etc., and say that the count of said declaration and the matters therein contained, in manner and form as the same are above set forth, are not sufficient in law for the plaintiff to maintain his aforesaid action, and that he , the defendant , (is or are) not bound by law to answer the same; and this he ready to verify: Wherefore, for want of a sufficient count in said declaration in this behalf, the defendant pray judgment and that the plaintiff may be barred from maintaining his aforesaid action, etc.

.....
Attorney for defendant .

636 Illinois, joint and several counts

And the said defendant comes and defends the wrong and injury, when, etc., and says that the said several counts of the said declaration, and the matters and things therein contained, in manner and form as the same are above pleaded and set forth, are not sufficient in law, nor are either of said counts of said declaration sufficient in law for the said plaintiff to have and maintain his aforesaid action thereof against him the said defendant, and that he is not bound by law to answer the same; and this he is ready to verify; wherefore, etc.⁵⁹ (Conclude as in preceding form)

637 Illinois, affidavit of merits

In ordinary civil actions, no affidavit of merits is necessary to be filed in Illinois with the demurrer.⁶⁰ In attachments of water-craft an affidavit of merits is an essential part of the demurrer.⁶¹

638 Illinois, certificate of cause

..... hereby certifies that he is the attorney for the plaintiff (or defendant or respondent) herein and that in his opinion the foregoing demurrer to the plea (declaration or petition for, etc.) of the defendant (or plaintiff) filed herein, is well founded in law.

⁵⁹ Sanford v. Gaddis, 13 Ill. 330.

⁶⁰ Sec. 55, Practice act 1907.

⁶¹ Johnson v. Chicago & P. E. Co.,

105 Ill. 462, 467; affirmed 119 U.

S. 388 (1882-1886); Sec. 19, c. 12,

Hurd's Stat. 1909.

639 Illinois, affidavit of good faith

....., being first duly sworn, deposes and says that he is the agent and attorney in this behalf of the plaintiff (or defendant) herein and that he is duly authorized to make this affidavit on behalf of said plaintiff* (or defendant) and that the foregoing demurrer to the plea (or declaration) of the defendant (or plaintiff) filed herein is not interposed for delay. Further affiant says not.

Subscribed, etc.

640 Maryland

The defendant,, a body corporate, by
, its attorney, demurs to the declaration filed in the above
 entitled case, and for reason says:

1. That it is bad in substance.
2. That it is insufficient in law.

.....
 Attorney for defendant.

641 West Virginia

The demurrer of, guardian *ad litem* for the
 above named infant defendants,

The said, guardian *ad litem*, as aforesaid, for
 and on behalf of the said, says that the said
, of said, filed in this cause, is not suffi-
 cient in law.

Wherefore, he prays judgment of the court whether he, as
 guardian *ad litem*, or the said infants, or either
 of them, shall be required to make any further or other answer
 to said petition.

.....
 Guardian *ad litem* for.....
 By
 their guardian *ad litem*.

SPECIAL DEMURRER

642 Florida

Special demurrers are not permissible in Florida.⁶²

643 Illinois, duplicity

(Precede this by general demurrer, then add:)

And the said defendant according to the form of the statute
 in such case made and provided states and shows to the court

⁶² Camp & Bros. v. Hall, 39 Fla.
 535, 568 (1897); Sec. 1430, Genl.
 Stats. 1906 (Fla.).

here the following causes of demurrer to the said count of the said declaration, that is to say, that the said count of the said declaration is double and multifarious in this that it alleges and states two or more distinct causes of action against the said defendant and presents and offers two or more separate and distinct issues to be decided in this, that it states that the said defendant by its servants failed to ring a bell or blow a whistle thereby causing the injury complained of, and that the said defendant by its servants carelessly, negligently and wilfully drove its engine thereby causing the injury complained of; and the said count is in various other respects repugnant, multifarious, insufficient and immaterial. (Add to this and subsequent demurrers, certificate of cause and affidavit of good faith, or non-delay, as under Sections 638 and 639.)

644 Illinois, misjoinder of parties and causes

(Precede this by general demurrer, then add:) And the said and, according to the form of the statute in such case made and provided, state and show to the court here the following causes of demurrer to the said declaration, that is to say, for that the said plaintiff h declared against the said defendants in action of assumpsit for supposed breaches of express promises to pay the plaintiff the sum of dollars (\$....), with interest in accordance with the terms of a certain writing obligatory, which the said defendant, was not a party to, or bound or obligated by, and has also declared against the said defendant, in an action of assumpsit for supposed breaches of express promises to pay the plaintiff certain sums of money in accordance with the terms of a certain instrument in writing, to which the said defendant and were not parties to, or bound by; and also, for that there are in the said declaration different pretended causes of action founded upon different supposed obligations and promises which are incompatible, and ought not to be joined in the same declaration.

Wherefore, etc.

or

For that in and by said declaration, and each and every count thereof, the said plaintiff hath declared and complained against the defendant,, and the defendant,, as joint tort feorsors; but as is shown by said declaration, there are pretended causes of action different in their nature, mode of proof and degree of liability comprehended and included in each and every count thereof; to wit, a pretended cause of action against the defendant, arising out of contractual relations between it and the said plaintiff, its servant; and a pretended cause of action against the defendant, with which said defend-

ant, the plaintiff, never had contractual or other relations whatsoever; which said pretended causes of action are incompatible with each other, and ought not to be joined in the same declaration against the said two defendants; and also for that, in and by said declaration, and each and every count thereof, conclusions of law are alleged without statements of fact upon which such conclusions are predicted; and also that the said declaration, and each count thereof, is in other respects uncertain, informal and insufficient, etc.

Wherefore, etc.

645 Illinois, nonjoinder

And the said defendant, by, his attorney, says that the declaration in this cause is not sufficient in law, and the said defendant shows and specifies the following causes of demurrer thereto, that is to say: Under the allegations of said declaration, is jointly entitled with the plaintiff to any damages which might be recovered in said suit, and the plaintiff is not, as alleged in said declaration, solely entitled thereto; and also that the said declaration is in other respects uncertain, informal, and insufficient, etc.

646 Illinois, uncertainty

And the said defendant , by h attorney say that the declaration is not sufficient in law. And the defendant show to the court here the following new cause of demurrer to the said declaration and each count thereof that is to say:

The plaintiff ha filed with h said declaration in obedience to the order of court herein an itemized statement of account and made the same a part of h said declaration which being read and heard the defendant say that said statement shows an account of the said plaintiff with one but not with these defendants: whereby the said declaration and each count thereof is rendered uncertain, informal and insufficient, etc.

647 Michigan, demurrer

Now comes the said defendant by, his attorney, and says that the said declaration is not sufficient in law for the reason that (Add briefly and plainly the special reasons in matter of substance, as well as of law.) ⁶³

.....
Defendant's attorney.

⁶³ Circuit court rule 5 (a);
(10068), (10069), C. L. 1897
(Mich.).

648 Michigan, certificate of good faith

I hereby certify that I am the counsel, having proper charge of the above entitled cause, in behalf of the above named defendant; that the foregoing demurrer is not interposed for delay; and that in my opinion the same is well founded.

Dated, etc.

.....
Defendant's attorney.

649 Mississippi, demurrer

Comes the defendant herein,, by attorney
....., and demurs to the declaration herein filed against him by the plaintiff,, and for cause of demurrer, says as follows: 1. The declaration is insufficient in law. 2. The declaration does not set out a cause of action. 3. It is not shown that there was any promise on the part of the defendant to pay any sum. 4. It is not alleged that the defendant impliedly promised to pay any stated sum. 5. It is not alleged that the defendant expressly or impliedly promised to pay the amount alleged to be due, or any amount. 6. It is not shown that the charge was usual or reasonable or that it was assented to by the defendant. 7. For other causes to be shown at the hearing. Wherefore, defendant prays judgment.⁶⁴

.....
Defendant's attorney.

650 Mississippi, certificate of counsel

I,, do hereby certify that I believe that the grounds on which the above demurrer is based are well founded, and that the demurrer should be sustained.

.....
..... attorney.

651 Virginia, demurrer

The defendant comes and says that the declaration is not sufficient in law for the following reasons and others to be assigned at the bar of the court.

1. (State grounds in numerical order) ⁶⁵

..... p. d.

652 Virginia, grounds of demurrer

1. The negligence, if any, was the negligence of an independent contractor, to wit,, for whose acts the defendant in this suit was not and is not responsible.

⁶⁴ Sec. 754, Miss. Code 1909.

⁶⁵ Sec. 3271 Va. Code Ann.

2. Defendant denies all allegations of negligence in the declaration and each count thereof.

3. The defendant denies that it was negligent in failing to supply suitable appliances and instrumentalities, and on the contrary says that the same were in safe and proper condition.

4. The defendant denies that it failed to perform any legal duty as to inspecting or keeping in safe condition and repair its appliances and instrumentalities.

5. The plaintiff assumed the risk.

6. The plaintiff was guilty of negligence on his own behalf, which caused or contributed to his injury.

7. The negligence, if any, was that of a fellow-servant.

OYER

653 Craving oyer

At common law oyer cannot be had of an instrument which is not under seal and of which no profert is made.⁶⁶ The right to oyer, in Illinois, has been extended to all written instruments, whether under seal or not, and it is not made dependable upon profert; but, this right is limited to instruments in writing declared upon and constituting the cause of action or defense; it does not apply to instruments constituting mere inducement.⁶⁷ A variance between a pleading and the instrument sued upon, set up as a defense, may be raised by craving oyer and demurring, provided the instrument is of a proper character.⁶⁸ If the nature and effect of a contract is misstated in a declaration the defendant should crave oyer and demur to it.⁶⁹

654 Craving oyer and demurrer

And the said defendant,, by, his attorney, comes and defends the wrong and injury, when, etc., and craves oyer of the supposed writing obligatory in said declaration mentioned, and it is read to him, in these words: (Insert copy of instrument sued on).

Which being read and heard, the defendant says that the said declaration and the matters and things therein contained, in manner and form as the same are above pleaded, are not sufficient in law for the plaintiff to maintain his aforesaid action and

⁶⁶ *Gatton v. Dimmitt*, 27 Ill. 400 (1862); *Riley v. Yost*, 58 W. Va. 213 (1905); *Commercial Ins. Co. v. Mehlman*, 48 Ill. 313, 315 (1865).

⁶⁷ *Lester v. People*, 150 Ill. 408,

417 (1894); Sec. 34, Practice act 1907 (Ill.).

⁶⁸ *Riley v. Yost*, 58 W. Va. 214.

⁶⁹ *Harlow v. Boswell*, 15 Ill. 56 (1853).

that the defendant is not bound by law to answer the same, and this he is ready to verify; wherefore the defendant prays judgment of the said declaration whether he, the defendant, should be required to reply thereto.

And the defendant further demurs specially to said declaration, and for causes of demurrer says that it does not appear from the said declaration that the notice alleged as having been served by plaintiff upon said, which said declaration alleges was in accordance with the terms of said alleged contract, was a written notice, as was required by said alleged contract.

2. That said declaration does not allege that notice was given defendant by plaintiff of the service of the notice required by the language of the said alleged contract.

(Add certificate and affidavit disclaiming delay)

b

And the defendant by, and, his attorneys, comes and defends the wrong and injury, when, etc., and craves oyer of the supposed writing obligatory or promissory note in said declaration mentioned, which is granted by the court, and the same is read to him in words and figures as follows: (Set forth promissory note *in hacc verba*).

And also craves oyer of the endorsement on said note in said declaration mentioned, which is granted by the court, and the said endorsement is thereupon read to him in words and figures as follows: (Insert endorsement).

Both of which being read and heard, the defendant says that the said declaration and the matters therein contained in manner and form as the same are above pleaded and set forth, are not sufficient in law for the plaintiff to maintain his aforesaid action, and that he, the defendant, is not bound in law to answer the same; and this he is ready to verify.

Wherefore for want of sufficient declaration in this behalf the defendant prays judgment, and that he, the plaintiff, may be barred from maintaining his action, etc.⁷⁰

655 Craving oyer, order

Now comes the plaintiff by and, her attorneys, and also now on this day comes the defendant by and, his attorneys, and craves oyer of the promissory note mentioned in the plaintiff's declaration, and also craves oyer of the endorsement on said promissory note. And thereupon the court grants oyer of both said promissory note and the endorsement thereon, which said note and endorsement thereon are then read to the defendant in these

⁷⁰ Kister v. Peters, 223 Ill. 607 (1906).

words and figures: (Set forth note and endorsement *in haec verba*).

And after oyer was demanded and granted the defendant demurs to the plaintiff's declaration.

DEMURRER TO PLEA

656 Discontinuance

An action is discontinued by demurring or replying to a plea which purports to, and in fact does, answer a part of the declaration, unless, during the term at which the plea is filed, the plaintiff takes judgment, as by *nil dicit*, on the unanswered part of the declaration.⁷¹ A plaintiff does not discontinue his action by demurring to a plea which professes to answer the whole of the declaration but which in fact answers a part alone.⁷² No discontinuance of an action can take place where there are pleas answering the whole cause of action.⁷³

657 Grounds generally

All objections to pleas in abatement or to the jurisdiction, whether of form or substance, can be raised by general demurrer.⁷⁴

658 General issue, plea amounting

A special plea which alleges matter that can be proved under the general issue or a plea which traverses a portion of the facts the plaintiff is bound to prove to establish a *prima facie* case, amounts to the general issue and is bad on special, but not on general demurrer.⁷⁵

659 Immaterial issue

A plea which presents an immaterial issue is demurrable.⁷⁶

⁷¹ Warren v. Nexsen, 3 Scam. 38, 40 (1841); Safford v. Vail, 22 Ill. 327, 330 (1859); Dickerson v. Hendryx, 88 Ill. 66, 69 (1878).

⁷² Snyder v. Gaither, 3 Scam. 91, 92 (1841).

⁷³ Snyder v. Gaither, *supra*.

⁷⁴ Willard v. Zehr, 215 Ill. 148, 157 (1905).

⁷⁵ Knoebel v. Kircher, 33 Ill. 308,

313 (1864); Ogden v. Lucas, 48 Ill. 492, 493 (1868); Manny v. Rixford, 44 Ill. 129, 130 (1867); Wadhams Swan, 109 Ill. 46, 54 (1884); Cushman v. Hayes, 46 Ill. 145, 155 (1867); Finch Co. v. Zenith Furnace Co., 245 Ill. 586, 591 (1910).

⁷⁶ Consolidated Coal Co. v. Peers, 166 Ill. 361, 365 (1897).

660 Insufficient traverse

A plea which professes to answer the whole cause of action but which in fact only answers a part, is bad on demurrer.⁷⁷

661 Same defense, practice

A plea which substantially presents the same defense as is presented by a previous plea, is not demurrable, but it constitutes ground for striking it from the files.⁷⁸

662 District of Columbia

Now come the plaintiff's by their attorney, and, say that the pleas of the defendant to the count of the plaintiff's declaration are bad in substance.

.....
Plaintiff's attorney.

Marginal Note:

The matters of law intended to be argued at the hearing of these demurrers are that all of said pleas are equivalent to the general issue.

663 Florida, demurrer

Now comes the plaintiff in the above entitled cause by , his attorney, and says that the defendant's (second) plea filed in said cause is bad in substance, and in the margin hereof assigns as substantial matters of law intended to be argued thereon.

.....
Plaintiff's attorney.

For substantial matters of law intended to be argued and insisted upon before the court upon the foregoing demurrer, the plaintiff assigns the following: 1. That the defendant's plea neither sets forth nor avers matter which would constitute a defense to the plaintiff's declaration (Proceed with all other assignments in a similar way).

.....
Plaintiff's attorney.

664 Florida, affidavit of good faith

Before me, the undersigned authority, personally appeared, who being by me first duly sworn deposes and

⁷⁷ Snyder v. Gaither, 3 Scam. 91 (1841).

⁷⁸ Ringhouse v. Keener, 63 Ill. 230, 235 (1872).

says that he is the plaintiff in the above entitled cause, and that the foregoing demurrer is not interposed for the purpose of delaying said cause or any proceeding therein.

.....

Plaintiff.

Subscribed, etc.

665 Florida, certificate of counsel

I,, the undersigned, of counsel for the plaintiff, in the above entitled cause, do hereby certify that in my opinion the foregoing demurrer is well founded in point of law.

.....

Of counsel for plaintiff.

666 Illinois; conclusion and prayer, want of

(Precede by general demurrer and add:) And the plaintiff.. show.. to the court here the following cause of demurrer to the said pleas and each of them, that is to say, that said pleas do not nor does either of them conclude with a verification, and they do not, nor does either of them, conclude with a prayer for judgment; and they, and each of them, are in other respects uncertain, informal and insufficient. (Add certificate of cause and affidavit of good faith, Sections 638 and 639)

667 Illinois; general grounds

(Precede by general demurrer) And the plaintiffs show to the court here the following causes of demurrer to the said plea of the defendants by them thirdly above pleaded, that is to say, that: 1. The said plea does not tender any issue of fact. 2. The said plea is not a complete defense. 3. The said plea traverses an issue of law. 4. The said plea, though in a form a plea in bar, sets up matter in abatement and is too late after the general issue. 5. The said plea does not traverse any fact alleged in said count of plaintiff's declaration. 6. The said plea though in form a special plea in bar does not confess and avoid and does not give color. And also that the said plea is in other respects uncertain, informal and insufficient, etc. (Add certificate of cause and affidavit of good faith)

668 Illinois; general issue, plea amounting

(Demur generally and then add the following ground)

And for a special ground of demurrer, the plaintiff.. say.. that said plea of the defendant.. amounts to the general issue. (Add certificate of cause and affidavit of good faith)

669 Illinois; insufficient traverse

(Precede by general demurrer, and add:) And the plaintiff shows to the court here the following causes of demurrer to the said plea of the defendant by him above pleaded, that is to say, that the said plea assumes to answer the whole of the plaintiff's amended declaration, while in law it fails to answer a part thereof, to wit: the third and fourth counts thereof; and also that the said plea is in other respects uncertain, informal and insufficient.

That the said plea does not answer the first and second counts of the declaration in that said counts and each of them set forth a contract fully executed by the plaintiff within a year.

That the said plea does not answer the first and second counts of the declaration in that said counts and each of them set forth a contract which was capable of being performed within one year. (Conclude as in preceding form)

670 Maryland, demurrer

The plaintiff,, by her attorneys,, demurs to the plea of the defendant's pleas filed by the defendant in the above entitled case on 19.., and says that said plea is insufficient in law.

.....
Attorneys for plaintiff.

b

....., the plaintiff in the above entitled case, by and, its attorneys, demurs to the first, second and third pleas, and each of them, filed to the declaration in this case, and waiving all objections that might be made to said pleas on the ground that they, or any of them, are equivalent to the general issue, for demurrer says: that said pleas and each of them are bad in substance.

.....
.....
Attorneys for plaintiff.

671 Maryland, setting hearing

Ordered by the circuit court for county this day of, 19.., that the above demurrer be set down for hearing on the day of, 19.., provided a copy of this order be served on the defendant or its attorneys of record on or before the day of, 19..

.....

672 Withdrawing plea

Upon the filing of a demurrer to a bad plea the defendant may obtain leave to withdraw the plea and to plead *de novo*. A

failure to withdraw a bad plea amounts to an election to abide by its validity and precludes the right to object to the rendition of final judgment.⁷⁹

DEMURRER TO REPLICATION

673 District of Columbia

Now comes the defendant and says that the plaintiff's replications to the defendant's plea are bad in substance.

.....
Attorney for defendant.

Note: The principal point of law to be argued at the hearing of the above demurrer is that the allegations of the replications are inconsistent with those of the declaration. (Add notice to call up demurrer, and service)

674 Illinois; general demurrer

And as to the first replication of said plaintiff to said and pleas of this defendant, he says that said replication is not sufficient in law as to either of said pleas, and that this defendant is not bound to answer the same. Wherefore, for want of a sufficient replication in this behalf said defendant prays judgment, etc.

.....
Attorney for said defendant.

675 Illinois; special, departure

(Demur generally and then aver as follows:)

And the defendant shows to the court here the following cause of demurrer to said and replications and each of them in that said replications and each of them constitute a departure, that is to say, that the plaintiff has alleged in the and additional counts of its declaration, and each of them, that it contracted with the to sell and deliver certain pictures to said and that the defendant,, guaranteed the performance of said contract for said; and in said and replications and each of them, the plaintiff alleges that the defendant was doing business under the name of the and that the defendant was said And also said and replications and each of them, are in other respects uncertain, informal and insufficient, etc.

⁷⁹ *Clemson v. State Bank of Illinois*, 1 Seam. 45 (1832); *Conradi v. Evans*, 2 Seam. 185, 186 (1839).

676 Illinois; special, general causes

And the said defendant, by, his attorney, says that the replication of the said plaintiff to the said second, third, fourth and fifth pleas of the said defendant, and the matters therein contained, in manner and form as the same are above pleaded and set forth, are not sufficient in law for the said plaintiff to have or maintain his aforesaid action thereof against the said defendant, and that it, the said defendant, is not bound by law to answer the same; and this the said defendant is ready to verify; wherefore, by reason of the insufficiency of said replication in this behalf, the said defendant prays judgment if the said plaintiff ought to have and maintain his aforesaid action against him, etc.

And the said defendant, according to the form of the statute in such case made and provided, states and shows to the court for special causes of demurrer the following:

1. That said replications, and each of them, are double; i. e., set up two distinct replies to the allegations to the defendant's pleas.

2. That the allegations contained in said replications, and each of them, are not responsive to the allegations of said defendant's pleas.

3. That said replications, and each of them, are double.

4. And also for that the said replications are in other respects uncertain, informal and insufficient, etc.

.....
Attorney for said defendant.

JOINDER**677 Florida, form**

Now comes the plaintiff in the above entitled action at law and says that the declaration is good in substance.

.....
Plaintiff's attorney.

Notice

To.....

Defendant's attorney.

Take notice that I will call up for hearing, 19.., before the honorable, judge at, Florida, or wherever else he may then be, the demurrer interposed in said cause to the plaintiff's declaration.

Dated, etc.

.....
Plaintiff's attorney.

Notice of the above received by me this day of....
....., 19..

.....
Defendant's attorney.

678 Illinois, form

And the plaintiff says, that the said declaration and the matters therein contained, in manner and form as the same are above set forth, are sufficient in law for him to maintain his aforesaid action; and he is ready to verify the same, as the court shall direct; wherefore, inasmuch as the defendant has not denied the said declaration the plaintiff prays judgment, and his damages, etc., to be adjudged to him, etc.

.....
Attorney for plaintiff.

679 Michigan, necessity of joinder

A judgment on demurrer may be rendered without a joinder therein.⁸⁰ Under former Michigan practice, joinder in a demurrer within the time fixed by rule was essential whether the demurrer was frivolous or not. And by so joining it was not an admission that the demurrer was frivolous.⁸¹ But now, no joinder in a demurrer is necessary.⁸²

680 Michigan, form

And the said by its attorney says that the said declaration is sufficient in law.

.....
Plaintiff's attorney.

681 Virginia, form

The defendant (or plaintiff) says that the (Name pleading) is not (or is,) sufficient in law.⁸³

CONSTRUCTION**682 Nature and effect**

A demurrer questions the sufficiency of only such matters as appear upon the record itself, or of such matters as are necessarily implied by law.⁸⁴ In its effect, a demurrer reaches back through the whole record and attaches to the first substantial defect in the pleadings.⁸⁵

⁸⁰ *Mix v. Chandler*, 44 Ill. 174 (1867).

⁸¹ *Wyckoff, Seamans & Benedict v. Bishop*, 98 Mich. 352, 355 (1894).

⁸² Circuit court rule 5 (d).

⁸³ Sec. 3271, Ann. Code 1904 (Va.).

⁸⁴ *Norfolk v. People*, 43 Ill. 9, 11 (1867).

⁸⁵ *People v. Central Union Tel. Co.*, 232 Ill. 260, 275 (1908).

683 Admissions

Facts well pleaded are admitted by a demurrer. Conclusions of law stated by the pleader, and the construction placed by him upon statutes are not admitted by demurrer.⁸⁶ A demurrer admits the facts to be true as pleaded.⁸⁷ It does not admit facts which are improperly pleaded.⁸⁸ A party admits the proper filing of a plea by demurring to it instead of moving to strike it out.⁸⁹

684 Inferences

On demurrer the intendments are against the pleader, and mere inferences, or implications from facts, stated cannot be indulged in his favor.⁹⁰

CARRYING BACK DEMURRER

685 Rule

In the absence of a plea of the general issue, a demurrer opens the entire record and may be carried and sustained to the first defective pleading in matter of substance, but not in matter of mere form, even where the pleading demurred to is also defective.⁹¹ A demurrer will not be carried back to a pleading which does not profess to answer another pleading and with which it has no connection, as pleas in abatement and pleadings involving different and unconnected matter of defense;⁹² nor to a pleading which has been held good on a previous demurrer and the party has pleaded over, because pleading and demurring to the same matter is not permissible.⁹³ The trial court may,

⁸⁶ *McPhail v. People*, 160 Ill. 77, 83 (1896); *Cerveney v. Chicago Daily News Co.*, 139 Ill. 345, 353 (1891); *People v. Busse*, 248 Ill. 11, 17 (1910).

⁸⁷ *Bailey v. Cowles*, 86 Ill. 333, 335 (1877).

⁸⁸ *Lindley v. Miller*, 67 Ill. 244, 249 (1873).

⁸⁹ *Juilliard & Co. v. May*, 130 Ill. 87, 96 (1889).

⁹⁰ *Fairbank Co. v. Bahre*, 213 Ill. 636, 638 (1905).

⁹¹ *Peoria & Oquawka R. Co. v. Neill*, 16 Ill. 269, 270 (1855); *Hedrick v. People*, 221 Ill. 374, 377 (1906); *Louisville, N. A. & C. Ry.*

Co. v. Carson, 169 Ill. 247, 255 (1897); *Illinois Fire Ins. Co. v. Stanton*, 57 Ill. 354, 359 (1870); *Chestnut v. Chestnut*, 77 Ill. 346, 348 (1875); *People v. Crabb*, 156 Ill. 155, 166 (1895).

⁹² *Ryan v. May*, 14 Ill. 49, 51 (1852); *Hunter v. Bilyeu*, 39 Ill. 367, 370 (1866).

⁹³ *Bills v. Stanton*, 69 Ill. 51, 53 (1873); *Scott (Town) v. Artman*, 237 Ill. 394, 399 (1908); *Heimberger v. Elliot Frog & Switch Co.*, 245 Ill. 448, 452 (1910); *Culver v. Third National Bank*, 64 Ill. 528, 532 (1871).

however, dismiss the suit, and thereby, in effect, reverse its former ruling, where a pleading to which a demurrer has been overruled is so defective that a motion in arrest of judgment would be sustained, or the defect is such that it could be taken advantage of on error.⁹⁴ A defendant is not precluded from interposing the defense of the statute of limitations by the overruling of a general demurrer to a declaration which improperly sets up matter in avoidance of the statute.⁹⁵

686 Application to declaration

A demurrer should be carried back to a declaration which is so defective that a judgment would be arrested.⁹⁶ A demurrer to a plea will not be carried back to a declaration after a demurrer to it has been overruled and the general issue has been pleaded.⁹⁷ Nor will a demurrer filed at any subsequent stage of the proceeding be carried back over the general issue and sustained to the declaration, on the principle that a party will not be permitted to demur and to plead at the same time to the same matter.⁹⁸ But a demurrer may be carried back over the general issue to a declaration which discloses on its face that the plaintiff has no cause of action; the plea, in such case is regarded as no plea at all.⁹⁹ As a demurrer to a plea will not, in some instances, be carried back and sustained to a declaration over the general issue, it is the practice to request leave to withdraw the general issue at the same time that a motion is made to have the demurrer carried back to the declaration. If the declaration is good, the motion to withdraw the general issue should be denied; if the declaration is bad the motion should be granted. Withdrawing a plea also withdraws a demurrer to it and prevents the carrying back of the demurrer to the declaration.¹⁰⁰

⁹⁴ *People v. Spring Valley (City)*, 129 Ill. 169, 178 (1889).

⁹⁵ *Leshner v. United States Fidelity & Guaranty Co.*, 239 Ill. 502, 508 (1909).

⁹⁶ *McFadden v. Fortier*, 20 Ill. 509, 515 (1858).

⁹⁷ *Brawner v. Lomax*, 23 Ill. 496 (1860).

⁹⁸ *Reeves v. Forman*, 26 Ill. 313,

319 (1861); *Compton v. People*, 86 Ill. 176, 178 (1877); *Mount v. Hunter*, 58 Ill. 246, 248 (1871); *Schofield v. Settley*, 31 Ill. 515, 517 (1863).

⁹⁹ *Haynes v. Lucas*, 50 Ill. 436, 439 (1869).

¹⁰⁰ *George v. Bischoff*, 68 Ill. 236, 238 (1873).

687 Application to information

A demurrer to a plea may reach defects in an information in the nature of a *quo warranto*.¹⁰¹

688 Application to plea

A demurrer to a defective replication will be carried back to a defective plea. But it will not be carried back to a plea which has been held good on demurrer, because by pleading over the sufficiency of the plea is admitted.¹⁰²

689 Motion, necessity

A demurrer will not be carried back to a pleading without a motion made for that purpose.¹⁰³

JUDGMENT

690 Necessity of judgment

Questions raised by demurrer should be disposed of before trial on issues of fact and final judgment.¹⁰⁴

691 Confessing and sustaining demurrer, order

This day comes the defendant to this suit by its attorney and confesses the plaintiff's demurrer filed herein to the defendant's plea filed herein, and on motion of the defendant's attorney it is ordered that leave be and is hereby given the defendant to file an amended plea herein *instantly* and that the plaintiff's demurrer to the defendant's original plea stand as demurrer to said amended plea as aforesaid; and the said cause coming on to be heard upon the said demurrer to the defendant's amended plea filed herein, after argument of counsel and due deliberation by the court, said demurrer is sustained and it is ordered that leave be and is hereby given the defendant to file amended pleas herein within days from this date.

¹⁰¹ Distilling & Cattle Feeding Co. v. People, 156 Ill. 448, 485 (1895).

¹⁰² Schalucky v. Field, 124 Ill. 617, 620 (1888); Illinois Fire Ins. Co. v. Stanton, 57 Ill. 359; Ryan v. Vandalingham, 25 Ill. 128, 131 (1860); Fish v. Farwell, 160 Ill. 236, 241 (1896).

¹⁰³ Heimberger v. Elliot Frog & Switch Co., 245 Ill. 452; Scott (Town) v. Artman, 237 Ill. 394, 399 (1908).

¹⁰⁴ Waterbury v. McMillan, 46 Miss. 635, 639 (1872).

692 Sustaining demurrer, generally, appeal

An order sustaining a demurrer is not final and appealable although it recites that the plaintiff or petitioner elects to abide by his declaration or petition and he declines to plead further and a judgment for costs should be entered against him, when there is nothing in the order that is in the nature of a determination of the rights of the parties.¹⁰⁵ A judgment sustaining a general demurrer to a declaration and awarding a defendant execution for costs and charges expended "in this behalf" is not final and appealable, because such a judgment neither adjudges that the plaintiff take nothing by the writ, or that the defendant go hence without day.¹⁰⁶

Upon sustaining a demurrer to a declaration, in whole or in part, there should be an order allowing the plaintiff time to amend his declaration, if he so chooses.¹⁰⁷ The mere omission to enter a formal judgment of *respondeat ouster* is not prejudicial to a party who has had an opportunity to plead over.¹⁰⁸

A final judgment may be rendered for the plaintiff upon overruling a demurrer to a declaration or upon sustaining a demurrer to a plea where the defendant fails to withdraw the demurrer or to apply for leave to answer over.¹⁰⁹ The failure of a defendant to ask leave to withdraw his demurrer after it has been overruled and to plead is equivalent to an election to abide by it, and authorizes a final judgment against him, or an inquest to a jury to assess the damages when they do not rest in computation.¹¹⁰

On a demurrer to a bad plea the judgment may be interlocutory or final, according to the nature of the action. The judgment may be final where the defendant elects to stand by a bad plea by failing to move for its withdrawal and for leave to plead *de novo*.¹¹¹ Final judgment against the defendant may be rendered on a demurrer to a plea in bar which pleads matter in abatement, where the defendant elects to stand by the plea.¹¹²

¹⁰⁵ *People v. Board of Education*, 236 Ill. 154, 155, 156 (1908).

¹⁰⁶ *Chicago Portrait Co. v. Chicago Crayon Co.*, 217 Ill. 200, 201, 202 (1905).

¹⁰⁷ *Baylor v. Baltimore & Ohio R. Co.*, 9 W. Va. 270, 279 (1876).

¹⁰⁸ *Bradshaw v. Morehouse*, 1 Gilm. 396; *Haldeman v. Starrett*, 23 Ill. 393 (1860).

¹⁰⁹ *Godfrey v. Buckmaster*, 1

Scam. 447, 451 (1838); *Bradshaw v. Morehouse*, 1 Gilm. 396.

¹¹⁰ *Weatherford v. Fishback*, 3 *Scam.* 170, 174 (1841); *Bates v. Williams*, 43 Ill. 494 (1867).

¹¹¹ *Clemson v. State Bank of Illinois*, 1 *Scam.* 46; *Conradi v. Evans*, 2 *Scam.* 185, 186 (1839).

¹¹² *Pitts Sons' Mfg. Co. v. Commercial National Bank*, 121 Ill. 582, 588 (1887).

693 Sustaining demurrer, judgment (Illinois)

On this day came on for hearing the demurrers filed herein by and by, executors, etc., to the amended petition filed herein, and, after hearing counsel, it is ordered that said demurrers be sustained. And thereupon petitioner elected to abide by its petition and on respondents' motion said petition was ordered dismissed; to which orders petitioner then and there duly excepted. Thereupon petitioner prayed an appeal, which was allowed. On motion of petitioner, it was allowed days from this date in which to prepare and present a bill of exceptions.

Dated, etc.

Enter
Judge.

(Michigan)

In this cause, the demurrer of the said defendant,, to the declaration of the said plaintiff, having been duly brought on for argument, and all and singular being seen and fully understood by the court here, and it appearing, after mature deliberation thereon, that the said declaration and the matters therein contained are not sufficient by law for the said plaintiff to have and maintain his said action against the said and that the said plaintiff ought not to recover against the said his alleged damages; therefore, it is considered that the said plaintiff take nothing by his suit; and that the said defendant,, do go thereof without day; and it is further considered that the said defendant do recover against the said plaintiff its costs and charges by it about its defense in this behalf expended, to be taxed, and that the said defendant have execution therefor. It is further ordered that the plaintiff have until day of, to move for a new trial or to settle a bill of exceptions.

.....
Judge.

(West Virginia)

This day came again the said, guardian as aforesaid, and presented to the court his petition verified by his affidavit thereof appended, together with all of the papers and exhibits mentioned in, filed with, and made part of said petition on a former day of the present term of this court; and it appearing to the satisfaction of the court that said and and each of them are infants, under the age of twenty-one years, on motion of the parties in interest in said proceeding, said, who is an adult, and the mother of said three infants, was by the court appointed as guardian *ad litem* for said, and, and for

each of them. Whereupon, said accepted said appointment as such guardian *ad litem* for said infants and tendered her demurrer to the said petition; which demurrer, on her motion, was filed in said cause, and in which demurrer the said, guardian as aforesaid, joined, and the same was set down for argument. And the said cause now coming on to be heard upon the notice in writing by said, guardian, to the said defendants, docketed on the first day of the present term; upon the petition and the several and separate exhibits and papers, mentioned therein, and filed therewith, as part thereof; upon the said demurrer, and *joinder* therein as aforesaid; and upon the said former orders made in said cause, was argued by counsel: on mature consideration of all of which, the court is of the opinion that said demurrer is well taken.

It is therefore adjudged, ordered and decreed that the said demurrer to said petition be, and the same is hereby sustained, and the said, guardian as aforesaid, not desiring to amend his said petition, although he was granted leave by the court to do so, if he so desired; it is therefore further adjudged, ordered and decreed that the said petition and proceeding aforesaid be, and the same is hereby dismissed and stricken from the docket.

Petition for appeal

To the honorable judges of the Supreme Court of Appeals of the state of West Virginia:

The petition of the, a corporation of said state, respectfully shows that it is aggrieved by a judgment or order entered by the circuit court of county on the day of, 19.., in the above entitled proceeding then therein pending, sustaining a demurrer of the defendants to your petitioner's petition in said proceeding, and dismissing the same; and to the end that it may be relieved of such grievance it presents to this honorable court this, its petition, for a writ of error and *supersedeas* to the judgment or order complained of, accompanied by a transcript of the record of the said condemnation proceedings.

Petitioner respectfully submits that the said circuit court of county erred in sustaining said demurrer to said petition because, under the laws of said state of West Virginia, the averments of the said petition present a proper case for the exercise of the right of eminent domain, and the condemnation for the petitioner's use set forth in said petition, of the strips of land therein described.

Your petitioner therefore prays that a writ of error and *supersedeas* to the judgment or order complained of may be

awarded, and that it may be reviewed and reversed. And as in duty bound, your petitioner will ever pray, etc.

.....
By
Attorneys.

I,, an attorney practicing in the Supreme Court of Appeals of West Virginia, am of opinion that the matters set forth in the foregoing petition and accompanying record are proper to be reviewed.

.....
Dated
Writ of error and supersedeas allowed in court
.., 19..
Bond \$.....

694 Overruling demurrer to declaration, practice

After a demurrer to the declaration has been overruled a court may refuse, in its discretion, to permit the defendant to plead, unless he shall show a meritorious defense, where the plaintiff has filed an affidavit of amount due with his declaration.¹¹³

695 Overruling demurrer to declaration, judgments (Florida)

This cause was submitted upon demurrer to the declaration and upon consideration thereof it is adjudged that the demurrer be overruled and that the defendant plead to said declaration on or before the rule day in next.

Done and ordered in vacation at, Florida, this day of, 19..

.....
Judge.
(Michigan)

In this cause, the demurrer of the said,, to the declaration of the said having been duly brought on for argument, and all and singular the premises being seen and understood, and it appearing to the court now here, after mature deliberation thereon, that the said declaration and the matters therein contained are sufficient in law for the said to have and maintain his aforesaid action against the said,

Therefore, on motion of, attorneys for the said, it is ordered and adjudged by the said court

¹¹³ McCord v. Crooker, 83 Ill. 556, 560 (1876); Sec. 55, Practice act 1907 (Ill.).

that the said demurrer be and the same hereby is overruled, with costs in favor of said plaintiff to be taxed.

It is further ordered that the said defendant have days from this date in which to plead to said declaration.

696 Overruling demurrer to plea, nature and effect

An order overruling a demurrer to a plea, where the plaintiff abides by his demurrer, amounts to a judgment in bar of the cause of action set up in the count to which the plea is an answer, and it disposes of all of the issues that are raised by the count and the plea in so far as the trial court is concerned.¹¹⁴ No final judgment in bar of the entire action can be rendered upon overruling a demurrer to a special plea which answers a part of the declaration alone, where there are other pleas to the rest of the declaration.¹¹⁵

697 Withdrawing demurrer, costs

Upon the withdrawal of the demurrer to a plea and the failure to reply, a defendant is entitled to judgment for costs against the plaintiff.¹¹⁶

¹¹⁴ McCormick v. Tate, 20 Ill. 334, 337 (1858).

¹¹⁶ Hunter v. Bilyeu, 39 Ill. 370.

¹¹⁵ Armstrong v. Welch, 30 Ill. 337.

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IN GENERAL

698 Pleas; classes, naming

Pleas are either dilatory or in abatement, and peremptory or in bar.¹ The kind of pleas to be interposed to an action is governed by the dignity of the instrument on which the suit is founded; thus, if the action is on a record, conclusive between the parties, it can only be denied by plea of *nul tiel record*.² A

¹ Pitts Sons' Mfg. Co. v. Commercial National Bank, 121 Ill. 582, 586 (1887).

² Mills v. Duryee, 7 Cr. 481, 484 (U. S. 1813).

defendant does not lose his defense by merely misnaming his plea.³

699 Plea in bar defined

A plea in bar shows some ground to bar or defeat the action.⁴

700 Special plea, defined

A special plea sets up a defense by way of confession and avoidance without denying the plaintiff's cause of action.⁵

701 Special plea, scope

Any fact which constitutes a bar to the action must be pleaded.⁶ All matters in confession and avoidance must be specially pleaded. This applies to matters by way of discharge; to matters which show the transaction to be either void or voidable in point of law;⁷ and to matters of defense which arise after an issue or issues have been joined.⁸ An issue of law cannot be made directly by special plea.⁹ A defendant must make a complete defense, as a judgment upon the merits is conclusive of all defenses which are made, or which might be made.¹⁰

702 Special pleas amounting to general issue, test

A defendant has a right at any time to traverse any material allegation in a declaration, or to plead the general issue. He has no right to plead both pleas in the same action. If the defendant pleads matter which amounts to the general issue and also the general issue, the former plea may be stricken from the files as unnecessarily incumbering the record.¹¹ A special plea which amounts to the general issue is bad upon special demurrer,¹² and may, on motion, be stricken from the files.¹³ A special plea

³ *Kenyon v. Sutherland*, 3 Gilm. 99 (1846).

⁴ *Pitts Sons' Mfg. Co. v. Commercial National Bank*, 121 Ill. 587.

⁵ *Bailey v. Valley National Bank*, 127 Ill. 332, 338 (1889).

⁶ *Consolidated Coal Co. v. Peers*, 150 Ill. 344, 354 (1894).

⁷ Circuit court rule 66 (Mich.); *Tedder v. Fraleigh-Lines-Smith Co.*, 55 Fla. 496, 498 (1908).

⁸ *Mount v. Scholes*, 120 Ill. 394, 400 (1887).

⁹ *Wolf v. Powers*, 241 Ill. 9, 13 (1909).

¹⁰ *Neff v. Smith*, 111 Ill. 100, 110 (1884).

¹¹ *Curtiss v. Martin*, 20 Ill. 557, 571 (1858); *Wadhams v. Swan*, 109 Ill. 46, 54 (1884); *Knoebel v. Kircher*, 33 Ill. 308, 313 (1864).

¹² *Cook v. Scott*, 1 Gilm. 333, 338 (1844); *Wiggins Ferry Co. v. Blake-man*, 54 Ill. 201, 202 (1870); *Moss v. Johnson*, 22 Ill. 633, 643 (1859).

¹³ *Wadhams v. Swan*, 109 Ill. 54.

amounts to the general issue if it puts in issue a fact which the plaintiff is bound to prove under the general issue.¹⁴

703 Traverse, nature and scope; admission

Every fact which is essential to a cause of action is issuable.¹⁵ It is not permissible to traverse and to confess and avoid at the same time;¹⁶ nor to tender an evasive or immaterial issue.¹⁷ The denial must not be argumentative.¹⁸ A plea must be responsive to the count or the declaration to which it is pleaded.¹⁹ It should not set forth repugnant and inconsistent defenses.²⁰ The plea is double if it attempts to raise a variety of issues, some of which are material and some not.²¹ A plea is demurrable for duplicity if it contains two distinct matters, either of which would bar the action and each of which would require a separate answer.²² A plea which fails to traverse the gravamen of the plaintiff's cause of action is bad on demurrer.²³

A plea must contain a good answer to all that it professes to answer.²⁴ It should answer the whole of the declaration, and each count thereof.²⁵ The traverse should be as broad as the allegation it purports to answer.²⁶ A plea is bad as a whole, if it professes, in its commencement, to answer the whole cause of action but, in fact, answers only a part,²⁷ and it is obnoxious to a demurrer.²⁸ A plea which purports to answer the whole of a declaration containing several counts and answers only a special count, or omits to answer any or all of the remaining counts, or a material portion of them, is bad on general demurrer.²⁹ Unless there are other pleas to the unanswered portions of the decla-

¹⁴ *Wadhams v. Swan*, *supra*.

¹⁵ *Quincy Coal Co. v. Hood*, 77 Ill. 68, 72 (1875).

¹⁶ *Priest v. Dodsworth*, 235 Ill. 613, 619 (1908).

¹⁷ *Distilling & Cattle Feeding Co. v. People*, 156 Ill. 448, 485 (1895).

¹⁸ *Wadhams v. Swan*, 109 Ill. 54.

¹⁹ *School Trustees v. Cowden*, 240 Ill. 39, 42 (1909).

²⁰ *Distilling & Cattle Feeding Co. v. People*, 156 Ill. 483.

²¹ *Distilling & Cattle Feeding Co. v. People*, 156 Ill. 484.

²² *Louisville, N. A. & C. Ry. Co. v. Carson*, 169 Ill. 247, 255 (1897).

²³ *Palestine v. Siler*, 225 Ill. 630, 637, 638 (1907).

²⁴ *Hatfield v. Cheaney*, 76 Ill. 488, 489 (1875); *Snyder v. Gaither*, 3 Scam. 91, 92 (1841).

²⁵ *Humphrey v. Phillips*, 57 Ill. 132, 135 (1870).

²⁶ *Wadhams v. Swan*, 109 Ill. 54.

²⁷ *Gebbie v. Mooney*, 121 Ill. 255, 257 (1887); *People v. Weber*, 92 Ill. 288, 291 (1879).

²⁸ *Warren v. Nexsen*, 3 Scam. 38, 40 (1841); *Dickerson v. Hendryx*, 88 Ill. 66, 68 (1878).

²⁹ *Gebbie v. Mooney*, 121 Ill. 255, 257 (1887); *People v. McCormack*, 68 Ill. 226, 230 (1873); *People v. Weber*, 92 Ill. 288, 291 (1879).

ration, a plea which professes to and does answer a part of the declaration, admits the parts that are unanswered.³⁰

Any material fact which is alleged in the declaration and which is not denied by the plea, is admitted and need not be proved by the plaintiff.³¹

704 Traverse; conclusion of law

Conclusions of law are not traversable.³² The allegation that a party was lawfully in possession of premises, and the mere averment in a declaration that it was the duty of the defendant to do certain things, are conclusions of law and are not traversable.

705 Traverse, immaterial matter

An averment in a declaration which is not material to the cause of action is not traversable; and if traversed it will be treated as surplusage.³³

706 Traverse, varying written instrument

In an action upon a written instrument, the plea should not attempt to vary the terms of the instrument by parol declarations of the parties made at the time of its execution.³⁴ A plea is demurrable if it attempts to lay the foundation for the introduction of oral testimony to vary the terms of a written instrument in a suit where the declaration sets out the instrument *in haec verba*, but the plea is not demurrable where the declaration is not so drawn. In the latter case the objection is available for the purpose of barring the evidence.³⁵ In Illinois, the consideration for which negotiable instruments are given may be impeached by parol evidence at the instance of the defendant, but not at that of the plaintiff.³⁶

³⁰ Dickerson v. Hendryx, 88 Ill. 69.

³¹ Hughes v. Richter, 161 Ill. 409, 411 (1896); Fish v. Farwell, 160 Ill. 236, 242 (1895).

³² Chicago & Alton R. Co. v. Clausen, 173 Ill. 100, 105 (1898); Safford v. Miller, 59 Ill. 205, 209 (1871).

³³ Waterman v. Tuttle, 18 Ill. 292 (1857); Knoebel v. Kircher, 33 Ill. 308, 313 (1864).

³⁴ Harlow v. Boswell, 15 Ill. 56

(1853); Jones v. Albee, 70 Ill. 34, 37 (1873); Mason v. Burton, 54 Ill. 349, 355 (1870).

³⁵ Solary v. Stultz, 22 Fla. 263, 268 (1886); Booske v. Gulf Ice Co., 24 Fla. 550, 557 (1888); Griffing Bros. Co. v. Winfield, 53 Fla. 589 (1907).

³⁶ Schneider v. Turner, 130 Ill. 28, 38 (1889); Chicago Sash, Door & Blind Mfg. Co. v. Haven, 195 Ill. 474, 482 (1902); Sec. 9, Negotiable Instrument act (Ill.).

707 Judgment, estoppel

A defendant is entitled to a judgment in bar of the action if he succeeds on any one of his pleas which is a complete answer to the declaration; a plea in estoppel is no such plea.³⁷

DEFENSES

708 Accord and satisfaction, defined

An accord is a satisfaction agreed upon between the parties, which, when performed, operates as a bar to all actions upon that account.³⁸

709 Accord and satisfaction, when

A creditor's acceptance of less than is due him will not operate as a satisfaction of the demand where the amount due is certain and not disputed; but a creditor's acceptance of an amount claimed by the debtor to be due, paid in full settlement, is a satisfaction of the claim, where the amount due is unliquidated, or where there is a *bona fide* dispute as to how much is due, although the creditor protests at the time that it is not all there is due him, or that he does not accept it in full satisfaction of his claim.³⁹

710 Accord and satisfaction; pleading, proof

An accord and satisfaction may be proved under the general issue or under a plea of payment.⁴⁰

711 Accord and satisfaction; plea, requisites

A plea of accord and satisfaction must allege facts from which it appears that the defendant owes the plaintiff nothing, or that he owes less than the plaintiff claims.⁴¹ It is not necessary to allege that the release and quit claim are under seal.⁴²

³⁷ *Dana v. Bryant*, 1 Gilm. 104, 107 (1844).

³⁸ *Bailey v. Cowles*, 86 Ill. 333, 335 (1877).

³⁹ *Snow v. Griesheimer*, 220 Ill. 106, 109 (1906); *Wallner v. Chicago Consolidated Traction Co.*, 245 Ill. 148, 151 (1910).

⁴⁰ *Bailey v. Cowles*, *supra*; *Wallner v. Chicago Consolidated Traction Co.*, *supra*.

⁴¹ *Farmers & Mechanics' Life Assn. v. Caine*, 224 Ill. 599, 607 (1907).

⁴² *Bailey v. Cowles*, *supra*.

712 Adverse possession, proof

To constitute adverse possession a bar to a land owner's assertion of his legal title, the possession must have been hostile or adverse, actual, visible, notorious and exclusive, continuous, and under claim or color of title. The claim of title may be proved by acts which clearly indicate it. In determining whether the possession was adverse, all of the facts and circumstances attending the possession and the use of the land may be considered.⁴³

713 Agreement to dismiss, practice

A plaintiff's promise to dismiss a suit is not pleadable in bar. The agreement should be presented by motion to dismiss and affidavits.⁴⁴

714 Alteration, pleading

The alteration of an instrument sued upon must be specially pleaded; it cannot be proved under a general plea which simply denies the execution, the making and the delivery of the instrument.⁴⁵

715 Appropriations, constitutional power

The appropriation of certain sums of money for certain purposes merely confers authority to use the money appropriated for the designated purposes, but it is ineffectual to confer constitutional rights upon the officer for whose benefit the appropriation was made.⁴⁶

716 Attorney's fees, motion

Comes now the defendant in the above stated cause, by his attorney, and moves the court to strike out of the (second) count of plaintiff's declaration so much thereof as alleges as special damages the expense of retaining counsel to prosecute this suit to recover possession of the (goods or other property) alleged in plaintiff's declaration, amounting to the sum of dollars, for the reason that such attorney's fees is not a proper and legal element of damage.⁴⁷

⁴³ Rich v. Naffziger, 248 Ill. 455, 459 (1911).

⁴⁴ Christopher v. Ballinger, 47 Ill. 107, 108 (1868).

⁴⁵ Tedder v. Fraleigh-Lines-Smith Co., 55 Fla. 496, 499 (1908).

⁴⁶ People v. McCullough, 254 Ill. 9, 24 (1912).

⁴⁷ Gregory v. Woodbery, 53 Fla. 566 (1907).

717 Carrier's liability, limitation, proof

The limitation upon the common law liability of the carrier is invalid without proof of the shipper's assent to the restriction; and when the assent is that of the consignor in behalf of a consignee, it must be made to appear that the consignor had authority to bind the consignee.⁴⁸

718 Cause of action, practice

The plaintiff's failure to have a cause of action at the time suit was commenced, is a good defense to the action.⁴⁹ The failure to state a cause of action may be raised by motion for a directed verdict.⁵⁰

719 Conditions precedent; practice, proof

A defendant cannot rely upon a plaintiff's unperformed covenant as a condition precedent where the covenant goes only to a part of the consideration, but he must show a performance of the covenant on his part and then rely upon his claim for damages for any breach of covenant by the other party, either by way of recoupment, or in a separate action.⁵¹ The noncompliance with any of the conditions of a contract sued upon which will defeat the recovery, may be shown under the general issue.⁵²

720 Conditions subsequent; pleading, waiver

A defendant who desires to rely upon the nonperformance of a condition subsequent, must plead it.⁵³ Replying the waiver of a condition subsequent does not constitute a departure in a material matter.⁵⁴

721 Consideration, failure of

The verification of a plea of failure of consideration is essential to its validity.⁵⁵ Under Illinois practice, an affidavit of

⁴⁸ *Plaff v. Pacific Express Co.*, 251 Ill. 243, 248 (1911).

⁴⁹ *Hovey v. Sebring*, 24 Mich. 232 (1872).

⁵⁰ *Wallner v. Chicago Consolidated Traction Co.*, 245 Ill. 148, 151 (1910).

⁵¹ *Rubens v. Hill*, 213 Ill. 523, 536 (1905).

⁵² *Morley v. Liverpool & London*

& Globe Ins. Co., 85 Mich. 210, 217 (1891).

⁵³ *Carney v. Ionia Transportation Co.*, 157 Mich. 54, 59 (1909).

⁵⁴ *Tillis v. Liverpool & London & Globe Ins. Co.*, 46 Fla. 268, 279 (1903).

⁵⁵ *National Valley Bank v. Houston*, 66 W. Va. 336, 344 (1909); Sec. 3891, Code 1906 (W. Va.).

merits stands in place of a verified plea, whenever the plaintiff files with his declaration an affidavit of his claim or demand.⁵⁶

722 Copy of instrument sued upon

The want of a copy of an instrument sued upon is ground for a continuance, but not for the dismissal of the suit.⁵⁷ Objection to the sufficiency of a copy sued upon must be made before trial, or it is waived.⁵⁸

723 Corporate existence; general issue, admission

The plaintiff's existence as a corporation cannot be questioned under the general issue, but it must be put in issue by plea of *null tiel* corporation.⁵⁹ The general issue, if pleaded alone, admits the corporate existence of the plaintiff corporation.⁶⁰

724 Cumbering record, motion

Now comes the defendant in the above styled cause, by its undersigned attorneys, and not waiving the general demurrer filed to the plaintiff's declaration in said cause, but insisting and relying upon the same, and moves the court to strike out the declaration, or to require the plaintiff to amend the same, because in its present form it is so framed as to prejudice, embarrass, and delay the fair trial of said action, and in support of said motion the defendant makes the following specifications:

To require the plaintiff to state specifically wherein the defendant did not exercise all reasonable care and diligence in running its locomotive engine and cars, and wherein the said defendant did not exercise reasonable care and diligence required by law, the general allegation in plaintiff's declaration being insufficient to advise the defendant of all the particular acts of negligence which plaintiff may rely upon for recovery.

Wherefore, the defendant, in the event the court should overrule the general demurrer filed to plaintiff's declaration, moves the court to strike the said declaration, or to compel the amendments thereto according to the specifications as above.⁶¹

⁵⁶ Sec. 55, Practice act 1907 (Hurd's Stat. 1911, p. 1776). See Section 706.

⁵⁷ Hopkins v. Woodward, 75 Ill. 62, 65 (1874); Stratton v. Henderson, 26 Ill. 68, 75 (1861); Sec. 32, Practice act 1907 (Ill.).

⁵⁸ Chumasero v. Gilbert, 26 Ill. 39, 40 (1861).

⁵⁹ McIntire v. Preston, 5 Gilm. 48, 59 (1848).

⁶⁰ Bailey v. Valley National Bank, 127 Ill. 332, 341 (1889).

⁶¹ Atlantic Coast Line R. Co. v. Crosby, 53 Fla. 400 (1907).

Order

This cause came on to be heard upon the motion of the defendant to strike the declaration, or to require the plaintiff to amend the same; and after argument of counsel for the respective parties, and the court being advised in the premises, it is ordered that the said motion be, and the same is, hereby overruled, the court holding that the said declaration is not so framed as to prejudice, embarrass and delay a fair trial of the cause, and that the plaintiff is limited in the trial of said cause to the several specific acts of negligence set forth and alleged in said declaration, and that the same are properly set forth in one count; to which order of the court overruling the defendant's motion, the defendant did then and there except.

It is further ordered that the said defendant be, and it is hereby required, to plead to said declaration on or before day of, 19..

725 Defective return, notice

A defendant is charged with knowledge that an insufficient return of an otherwise legal service of process is amendable. The defective return can be taken advantage of only when no amendment according to the actual fact can ever show a valid service of process.⁶²

726 Defendant's capacity, admission

Unless the defendant's representative capacity is denied it stands admitted on the record.⁶³

727 Estoppel, pleading

Long delay and acquiescence in the performance of duty on the part of officers of the state is not imputable to the state when acting in its character of sovereign and when the application of the doctrine of estoppel is not necessary to prevent serious injury to individuals.⁶⁴ Matter of estoppel should be set up by replication only when the matter does not appear on the face of the declaration.⁶⁵

728 Foreign corporations' contracts

A contract entered into by a foreign corporation prior to its admission to do business in Illinois is absolutely void and cannot

⁶² *Spencer v. Rickard*, 69 W. Va. 322 (1911).

⁶³ *McNulta v. Ensich*, 134 Ill. 46, 54 (1890).

⁶⁴ *People v. Whittemore*, 253, 378, 382, 383 (1912).

⁶⁵ *Smith v. Whitaker*, 11 Ill. 417 (1849).

be made the basis of an action.⁶⁶ But the plaintiff's failure to qualify to do business in Illinois as a foreign corporation cannot be interposed in defense of an action involving interstate commerce or matter which has not arisen out of an illegal transaction of business in the state.⁶⁷ Foreign corporations which have qualified to do business in Illinois previous to 1905, are not required to re-qualify under the act of 1905.⁶⁸

729 Foreign corporations' noncompliance; plea, requisites

A plea of foreign corporation must allege noncompliance with the statute up to and at the time of the commencement of the suit.⁶⁹

730 Foreign corporation's noncompliance; plea (Illinois)

(Precede by general issue) And for a further plea in this behalf, the defendants say that the plaintiff, at the time of the supposed transactions in said declaration mentioned and at the time of the execution of the said bond, was a corporation organized and existing under the laws of the state of and doing business for profit in said state; that the said plaintiff is not a railroad or telegraph company, nor is it engaged in the insurance, banking or money loaning business; that the said writing in said declaration mentioned was executed in the state of Illinois and was for the purpose of securing the plaintiff for the purchase price of goods sold the defendant, and that the said goods were sold and delivered in this state, and all of said transactions were had in this state since the first day of July, 1905.

Defendants further aver that the said plaintiff had not prior to said transactions or prior to bringing this suit made application to the secretary of state, signed and sworn to by its president and secretary, stating what business it proposed to pursue under its charter, the amount of its capital stock, the proportion of its business to be carried on in this state, the amount paid in on its capital stock, the value of its property to be employed in this state, the names of its president, secretary, and directors and their residence, and the name and address of some attorney in fact upon whom service could be had in this state; nor had

⁶⁶ *United Lead Co. v. Reedy Elevator Mfg Co.*, 222 Ill. 199, 202 (1906).

⁶⁷ *Lehigh Portland Cement Co. v. McLean*, 245 Ill. 326, 333 (1910); *Alpena Portland Cement Co. v. Jenkins & Reynolds Co.*, 244 Ill. 354, 361 (1910); Sec. 6, c. 32, *Hurd's Stat.* 1909 (Ill.).

⁶⁸ *White Sewing Machine Co. v. Harris*, 252 Ill. 361, 367 (1911); 1905 Laws, p. 118.

⁶⁹ *McCarthy v. Alphons Custodis Chimney Construction Co.*, 219 Ill. 616, 625 (1906).

it prior to said times filed with the secretary of state a copy of its charter or articles of incorporation; nor had it complied with all the provisions of an act entitled, "An Act to regulate the admission of foreign corporations for profit, to do business in the state of Illinois," in force July 11, 1905; nor had it complied with all other regulations, limitations and restrictions applicable to domestic corporations of like character; nor had the secretary of state prior to said time issued a certificate entitling plaintiff to do business in Illinois as is provided by statute; nor had plaintiff prior to the commencement of this suit been licensed to do business in this state, as is by said statute provided.

Wherefore, by force of the statute in such case made and provided, the plaintiff cannot maintain its aforesaid action; and this the defendants are ready to verify: therefore they pray judgment if plaintiff ought to have its aforesaid action against them the said defendants.

Replication

And the plaintiff, as to the plea of the defendants above pleaded, says that it, the plaintiff, by reason of anything in that plea alleged, ought not to be barred from having its aforesaid action, because it says, that on the day of, it made application to the secretary of state of the state of Illinois for a license to do business in said state; that it filed in the office of the said secretary of state duly authenticated evidence of its incorporation, as is provided by law, and did, in all respects, comply with all the requirements of the laws of Illinois governing foreign corporations doing business in the state of Illinois; that said secretary of state, on the day of, issued to the plaintiff a certificate entitling it, the plaintiff, to do business in the state of Illinois for a period of ninety-nine years; and that the plaintiff has since said day of been legally qualified to do business in the state of Illinois; and this the plaintiff prays may be inquired of by the country, etc.⁷⁰

731 Foreign judgment

In an action on a foreign judgment or decree, all defenses which could have been urged to an action thereon in the state where the judgment or the decree was rendered, are available in a similar action in Illinois.⁷¹

⁷⁰ White Sewing Machine Co. v. Harris, 252 Ill. 361.

⁷¹ Britton v. Chamberlain, 234 Ill. 246, 249 (1908).

732 Foreign statute

The statute of another state, if relied upon as a defense, must be pleaded as set out, or in substance.⁷²

733 Fraud, burden of proof

The effect of interposing the defense of fraud in an action at law is merely to shift the burden of proof.⁷³

734 Fraud, pleading

Fraud and misrepresentation relating to the consideration of the instrument must be specially pleaded or noticed.⁷⁴

735 Fraud; plea, nature

A plea of fraud is a defense to the whole action.⁷⁵ A plea charging fraud in procuring the acceptance of a draft, is a plea at law and it is not available as an equitable defense.⁷⁶

736 Fraud; plea, requisites

A plea of fraud and circumvention must aver the facts which constitute the fraud,⁷⁷ or the means whereby the fraud was accomplished.⁷⁸ The plea must charge the plaintiff with knowledge or notice of the alleged fraud,⁷⁹ and it must aver reliance upon the representations claimed to be fraudulent.⁸⁰ A general charge that a party acted fraudulently or that he was guilty of fraud, is a conclusion and is insufficient.⁸¹ A plea of fraud and circumvention, under Illinois statute, must show fraud and circumvention in obtaining the execution of the instrument and not in the consideration.⁸² In West Virginia, a plea which alleges fraud in the procurement of the contract sued upon, must be verified by affidavit.⁸³

⁷² *Donovan v. Purtell*, 216 Ill. 629, 641 (1905).

⁷³ *Zeigler v. Illinois Trust & Savings Bank*, 245 Ill. 180, 196 (1910).

⁷⁴ *Miller v. Finley*, 26 Mich. 248, 250 (1872).

⁷⁵ *Sims v. Klein, Breese*, 302 (1829).

⁷⁶ *Stouffer v. Alford*, 114 Md. 110, 116 (1910).

⁷⁷ *Cole v. Joliet Opera House Co.*, 79 Ill. 96, 97, 98 (1875); *Jones v. Albee*, 70 Ill. 34, 36 (1873).

⁷⁸ *Hopkins v. Woodward*, 75 Ill.

62, 65 (1874); *Sims v. Klein, Breese*, 303; Sees. 9, 10, c. 98, *Hurd's Stat.* 1909.

⁷⁹ *Stouffer v. Alford*, *supra*.

⁸⁰ *Wisdom v. Becker*, 52 Ill. 342, 345 (1869).

⁸¹ *People v. Henry*, 236 Ill. 124, 128 (1908).

⁸² *Elliott v. Levings*, 54 Ill. 213, 214 (1870); *Latham v. Smith*, 45 Ill. 25, 27 (1867).

⁸³ *National Valley Bank v. Houston*, 66 W. Va. 336, 344 (1909); Sec. 3891, Code 1906.

737 Fraud; notice, proof

A notice which sets up fraud as a special defense limits the defendant to the specific fraud therein alleged.⁸⁴

738 Improper matter in declaration, motion to strike

Now comes the defendant in the above stated cause by his attorney, and moves the court to strike out of the count of plaintiff's declaration so much thereof as alleges special damages, the expenses of retaining counsel to prosecute this suit to recover possession of the, alleged in plaintiff's declaration amounting to the sum of, for the reason that such attorney's fees are not a proper and legal element of damage.

Dated, etc.

.....
Defendant's attorney.

739 Indebtedness not due, oyer

In an action upon an indebtedness which is not due but which is described as due in the declaration, the defendant may either set out the evidence of the indebtedness on oyer and demurrer to the declaration, or he may present the defense by an objection to the plaintiff's evidence on the ground of variance.⁸⁵

740 Jury, right

The constitutional right to trial by jury is limited to rights which existed at common law at the time of the adoption of the constitution. It does not include new rights which were unknown to the common law. An attorney's lien was unknown to the common law and its enforcement may be authorized without a trial by jury.⁸⁶

741 Jury; empaneling, notice

At common law the parties to a proceeding in which a jury is to be impaneled must have notice of when the jurors are to be selected, to give them an opportunity to be present and to interpose any legal objections to the qualifications of any person to sit as a juror in the cause.⁸⁷

⁸⁴ Pangborn v. Continental Ins. Co., 62 Mich. 638, 640 (1886).

⁸⁵ Harlow v. Boswell, 15 Ill. 56 (1853).

⁸⁶ Standidge v. Chicago Rys. Co., 254 Ill. 524, 532 (1912).

⁸⁷ Vandalia Drainage District v. Vandalia R. Co., 247 Ill. 114, 119 (1910).

742 Misnomer of defendant, waiver

By pleading in bar of an *ex delicto* action by the right name, a defendant waives his right to raise an objection on account of his misnomer.⁸⁸

743 Mutuality, want of

A contract which is not mutual is void for want of consideration.⁸⁹

744 Non est factum, nature and effect

At common law a plea of *non est factum* in actions upon specialties and the general issue in actions upon simple contracts put in issue the execution of an instrument.⁹⁰ A plea of *non est factum* merely denies the execution of the deed or instrument; it is not a plea of the general issue.⁹¹ The denial of the execution or assignment of an instrument includes the denial of its delivery.⁹²

The plea of *non est factum* is appropriate in Florida for the purpose of denying the execution of a sealed instrument.⁹³ If an instrument is made a part of the declaration, the execution of the instrument, if not denied by plea, is admitted.⁹⁴

In Illinois the execution or assignment of all written instruments, whether sealed or not, which form the basis of an action or a defense must be put in issue by verified plea of the general issue, by verified plea of *non est factum*, or by any verified plea which amounts to a denial of the plaintiff's cause of action. It cannot be done by verified notice filed with the general issue.⁹⁵ The execution or the assignment of an instrument is admitted if not denied by affidavit.⁹⁶

In Michigan the execution of an instrument sued upon is admitted, unless an affidavit denying the execution is filed with the

⁸⁸ Chicago & Alton R. Co. v. Heinrich, 157 Ill. 388, 393 (1895).

⁸⁹ Higbie v. Rust, 211 Ill. 333, 337 (1904).

⁹⁰ Bailey v. Valley National Bank, 127 Ill. 332, 339 (1889).

⁹¹ Reeves v. Forman, 26 Ill. 313, 319 (1861).

⁹² Bailey v. Valley National Bank, 127 Ill. 340.

⁹³ Tillis v. Liverpool & London & Globe Ins. Co., 46 Fla. 268, 277 (1903); Circuit Court Rule 67.

⁹⁴ Griffing Bros. Co. v. Winfield, 53 Fla. 589 (1907).

⁹⁵ Bailey v. Valley National Bank, 127 Ill. 338, 340; Gaddy v. McCleave, 59 Ill. 182, 184 (1871); McDonald v. People, 222 Ill. 325, 328 (1906); Sec. 52, Practice act 1907 (Ill.).

⁹⁶ McIntire v. Preston, 5 Gilm. 48, 63, 64 (1848).

plea.⁹⁷ Notice of special defense does not take the place of this affidavit.⁹⁸ In the absence of a denial, under oath, of the execution of the instrument sued upon, no contradictory evidence of the writing is admissible.⁹⁹

A plea of *non est factum* must be verified by affidavit, in West Virginia, or the plea will be rejected.¹⁰⁰

745 *Non est factum*, proof

Accord and satisfaction cannot be shown under a plea of *non est factum*.¹⁰¹ A married woman's incapacity to contract may be proved under this plea,¹⁰² and this rule is not changed by the Married Woman's act of 1861.¹⁰³ Fraud which relates to the giving of a deed or instrument and not to its consideration, as that it was misread to the maker or that the signature was obtained to an instrument which he did not intend to sign, may be shown under a plea of *non est factum*.¹⁰⁴ A plea of *non est factum* merely denies the execution of the deed or instrument in point of fact.¹⁰⁵ It will not authorize proof of the alteration of the deed or the instrument.¹⁰⁶

746 *Non est factum*; pleas (District of Columbia)

¹⁰⁷ Now comes the defendant, theand says that the writing obligatory is not its writing obligatory in manner and form as is alleged in said declaration.

(Illinois) *Plea*

And the defendant, by, his attorney, comes and defends the wrong and injury, when, etc., and says, that the said deed (or policy, as the case may be) as in said declaration stated is not his deed; and of this the said defendant puts himself upon the country, etc.

⁹⁷ *Miller v. Prussian Nat'l Ins. Co.*, 158 Mich. 402, 404 (1909).

⁹⁸ *Simon v. Home Ins. Co.*, 58 Mich. 278 (1885).

⁹⁹ *Union Central Life Ins. Co. v. Howell*, 101 Mich. 332, 334 (1894); *Miller v. Prussian Nat'l Ins. Co.*, *supra*.

¹⁰⁰ *National Valley Bank v. Houston*, 66 W. Va. 336, 344 (1909); Sec. 3859, Code 1906.

¹⁰¹ *Bailey v. Cowles*, 86 Ill. 333, 335 (1877).

¹⁰² *Streeter v. Streeter*, 43 Ill. 155, 164 (1867).

¹⁰³ *Streeter v. Streeter*, *supra*.

¹⁰⁴ *Dorr v. Munsell*, 13 Johns. 430 (N. Y. 1816); *Taylor v. King*, 6 Munf. 358, 366 (Va. 1819); *Franchot v. Leach*, 5 Cow. 506 (N. Y. 1826); *Cole v. Joliet Opera House Co.*, 79 Ill. 96, 97 (1875); See Section 706.

¹⁰⁵ Circuit Court Rule 67.

¹⁰⁶ *Tedder v. Fraleigh-Lines-Smith Co.*, 55 Fla. 496, 498 (1908).

¹⁰⁷ See Section 211, Note 60.

Plea b

That he never, on any occasion, time or place, made the said promissory note in the said plaintiff's declaration mentioned, "J. W. T. & Co." nor did he promise, jointly and severally, by the name, style and description of ".....," to pay the sum of money mentioned in said promissory note, to, nor did he ever, directly or indirectly, authorize the making of any such note as therein described, and the said defendant further avers, that on no occasion was he ever a copartner of the said, and that no relationship of the kind whatever ever subsisted between them, the said defendant, and said, expressly or by implication, and that he had no knowledge of the existence of said note until this action was brought, nor has he any knowledge of the consideration thereof, and positively denies the execution of the same in manner and form as in said plaintiff's declaration is alleged; and this the said defendant is ready to verify. Wherefore, etc.

Replication

And the said plaintiff, by his attorneys,, as to the said plea of the said defendant, impleaded, etc., by him secondly above pleaded, says, that he, the said plaintiff, by reason of anything by the said defendant in that plea alleged, ought not to be barred from having and maintaining his aforesaid action thereof against him, the said defendant impleaded, etc., because, he says, that the defendant did, on the occasion, time and place in said declaration mentioned, make the said promissory note in the said plaintiff's said declaration mentioned, in manner and form as therein alleged, and did promise, then and there, jointly and severally, by the name, style and description of, to pay the sum of money mentioned in said promissory note to the said, and did authorize the making of the said note in said declaration described. And the said plaintiff further replying, avers, that the said defendant, was a copartner of the said and that a relationship of that kind did subsist between the said defendant and said, and that said well knew the existence of said note at the time of the making thereof, and long before and up to and until the bringing of this action, and that the said defendant, did execute the said promissory note in said declaration mentioned, in manner and form as in said plaintiff's declaration is alleged. And of this the plaintiff puts himself upon the country, etc.¹⁰⁸

¹⁰⁸ Fuller v. Robb, 26 Ill. 246, 247 (1861).

(Maryland)

For a plea to the plaintiff's declaration, the defendant by its attorney says that the deed as described in said declaration is not the deed of this defendant.

.....
Attorney for defendant.

Affirmed as to the plea of *non est factum* this day of, by, secretary of the defendant company.

(Mississippi)

Personally appeared before me clerk of the court of said county and state,, who on oath says that he is not liable and not indebted in manner and form alleged to pay, or either of them, any of the alleged acceptances sued upon, because he says that he did not sign and execute said acceptances, or either of them; that said acceptances did not have any of them at the time his name was signed to them, the sum of dollars either in writing or figures, nor any promise to pay said sum, nor any sum; that defendant positively refused to sign any note or contract whatever to the, or anyone; that a person representing himself as agent of the, made a verbal contract with defendant whereby it was agreed that should ship defendant an assortment of jewelry, the amount and price of which was not then determined or agreed upon, which said jewelry was to remain in the store of defendant at for months on consignment, that defendant should sell what he could for any price he pleased and account from time to time to the company for what he actually sold, at the invoice price, that the defendant should never pay anything nor be liable for any jewelry not sold, and at the end of the year either party could have the jewelry unsold removed by the, that any profit made on the jewelry sold should belong to defendant, and that should furnish a case for the jewelry free of charge to defendant, which should belong to defendant at the end of the year; that the contract was made about and that the jewelry was delivered about; that defendant refused to sign any note for the jewelry at all; that the agent of plaintiff requested defendant to sign the instrument sued on simply to signify his acceptance of the jewelry and not as a note, on the representation that when defendant should report from time to time what jewelry was sold as was contemplated should be done every days and remit therefor would fill in the blanks the amount of the remittance and receipt the paper and return it; that he signed the blank acceptance only on such representation and understanding; that he would not have signed otherwise; that he did not authorize anyone to

fill in said blank acceptance the sum of dollars and treat and use the same as commercial paper, nor as a note, nor as any promise to pay money; that said acceptance was so filled in and used without his knowledge, consent or authority; that he would not have signed said acceptance had it been represented to him as an agreement to pay anything whatever; that he did not, by signing the same in on said representations of company's agent, intend thereby, and did not thereby, bind himself to pay anything; that said acceptance was not signed by him, and is wholly void and inoperative and was fraudulently obtained and fraudulently altered and filled in and fraudulently used contrary to the distinct understanding and agreement when signed; that he has remitted for all the jewelry that he has sold; that the remaining jewelry unsold is tarnished in the cases and is of no value, and that said acceptance is not signed and executed by defendant: all of which he is ready to verify.

.....
Defendant.

Sworn, etc.

747 *Nul tiel* corporation, plaintiff, nature and scope

A plea which denies that the plaintiff is a corporation, being in bar of the action, operates as a special traverse of the averment that the plaintiff is a corporation and puts it upon proof of that fact.¹⁰⁹ The defense of *nul tiel* plaintiff corporation can only be interposed by plea; it is not available under the general issue and notice.¹¹⁰ A plea of *nul tiel* corporation is good where there is no corporation at all, as distinguished from a *de facto* corporation.¹¹¹ A party who has contracted with an association as a corporation and who has received benefits under the contract, is estopped from questioning the legality of the incorporation in an action upon such contract.¹¹²

748 *Nul tiel* corporation, plaintiff, proof

All that is necessary for the plaintiff to prove under this plea is an organization in fact and a user of corporate franchises.¹¹³ The want of capacity to sue as a corporation may be shown

¹⁰⁹ *Lewiston v. Proctor*, 27 Ill. 414, 416 (1862); *Hoereth v. Franklin Mill Co.*, 30 Ill. 151, 157 (1863).

¹¹⁰ *Bailey v. Valley National Bank*, 127 Ill. 332, 340 (1889).

¹¹¹ *Imperial Building Co. v. Chi-*

cago Opera Board of Trade, 238 Ill. 100 (1909).

¹¹² *Booske v. Gulf Ice Co.*, 24 Fla. 550, 559 (1888).

¹¹³ *Mitchell v. Deeds*, 49 Ill. 416, 420, 422 (1867).

where the plea of *nul tiel* plaintiff corporation specifically denies the right to sue in the name used.¹¹⁴

749 Nul tiel corporation, plea

(Precede by general issue) And for further plea in this behalf, the defendant say *actio non* because he say that there is not and was not at the time of the commencement of this suit, any such corporation as the as by the said declaration is above supposed. And of this he putsel.... upon the country.

750 Nul tiel record, nature

A plea of *nul tiel* record is a plea in estoppel and does not preclude a party from insisting upon other defenses after the plea or replication is disposed of.¹¹⁵

751 Nul tiel record; evidence, coverture

Evidence of coverture is admissible under plea of *nul tiel* record.¹¹⁶

752 Nul tiel record, plea

(Commence as in Section 889) That there is not any such record in the court of county (or ever made) in the state of Illinois as plaintiff has above in its declaration alleged; and this the defendant is ready to verify; wherefore, he prays judgment, etc.

Replication

(Commence as in Section 928) That there is such a record remaining in the said court of county, as the plaintiff hath in its said declaration alleged; and this the said plaintiff is ready to verify by the said record, and therefore puts itself upon the court here for trial.

Plea b

That there is not any record of the said supposed order of dismissal of the said action of replevin, and order for the return of the property taken, in the said declaration mentioned, remain-

¹¹⁴ Marsh v. Astoria Lodge, 27 Ill. 421, 425 (1862).

¹¹⁵ Dana v. Bryant, 1 Gilm. 104, 108 (1844).

¹¹⁶ Forsyth v. Barnes, 228 Ill. 326, 331 (1907).

ing of record in the said court of county, in manner and form as the plaintiff ha in said declaration alleged; and this the defendant ready to verify; wherefore he pray judgment.

753 Nul tiel record; judgment, nature

A plea in estoppel requires a court's preliminary decision when there are other questions of fact to be tried; and a judgment thereon is merely interlocutory.¹¹⁷

754 Ordinance; collateral attack, burden of proof

The determination by an official body or tribunal, as a city council, upon any question within its authority to hear and determine, is, in effect, a judgment having all the properties of a judgment pronounced by a legally created court of limited jurisdiction and may be attacked collaterally only for want of jurisdiction. The burden of proving the want of jurisdiction for the purpose of collateral attack, is upon the party attacking the judgment or proceeding.¹¹⁸

755 Ordinance; validity, reasonableness, burden of proof

An ordinance will be sustained which is fairly susceptible of a construction that would make it valid, and also of one that would make it invalid.¹¹⁹ An ordinance is regarded as *prima facie* reasonable; the burden of proving its unreasonableness is upon those who assail it.¹²⁰

756 Ordinance, pleading

A municipal ordinance must be specially pleaded and in pleading the ordinance it is only necessary to set out the substantial parts of the ordinance so that its requirements may be seen and known.¹²¹

757 Organization, collateral attack

In a collateral proceeding involving the enforcement of an ordinance or the liability to a penalty or a tax, the validity of the

¹¹⁷ *Dana v. Bryant*, 1 Gilm. 108.

¹¹⁸ *People v. Ellis*, 253 Ill. 369, 374 (1912).

¹¹⁹ *Park Ridge v. Wisner*, 253 Ill. 360, 363, 364 (1912).

¹²⁰ *Springfield v. Postal Telegraph-Cable Co.*, 253 Ill. 346, 354 (1912).

¹²¹ *People v. Heidelberg Garden Co.*, 233 Ill. 290, 297 (1908).

proceeding by which the municipal corporation was created cannot be attacked or called in question in any respect by either party.¹²² And this rule extends to the territorial annexation or disconnection proceedings of a city council.¹²³

758 Oyer, motions (District of Columbia)

Now comes the defendant, by its attorney and craves oyer of the bond dated, alleged to have been given the plaintiff company by, since deceased, and the application therefor by the said dated, as referred to in plaintiff's declaration and affidavit filed herein.

.....
Attorneys for defendant.

(Illinois)

And now comes the said defendant by, its attorney, and craves oyer of the policies of insurance sued on, and moves for a rule upon the said plaintiff that he produce in court for the inspection of this defendant the original policies of insurance referred to and mentioned in his declaration filed herein, and each of them, and the conditions thereof; and that until such policies are produced the said cause stand continued without day.

.....
Defendant's attorney.

Order

And afterwards, to wit, on the day of, and of the term,, of the said court, the said motion and prayer for oyer came on to be heard before the honorable, one of the judges of said court, both parties being then and there present by their attorneys. And thereupon the said attorneys of the said defendant made said demand and prayer for oyer in open court and asked that said motion and prayer be granted as asked, but the court then and there in session denied said motion and decided that oyer of said policies of insurance could not be had or craved by the defendant; to which decisions and each of them the said defendant by its said counsel did then and there duly except.

759 Partnership, plea

(Commence as in Section 885) That the plaintiff ought not to have his aforesaid action against him the defendant

¹²² *People v. Ellis, supra.*

¹²³ *People v. Ellis, supra.*

because he says, he is not nor ever was a partner with the said in respect to the said several supposed causes of action in said declaration mentioned, or any or either of them in manner and form as the plaintiff has above in that behalf averred (Conclude to the country and add verification).

760 Payment; nature and scope

The payment of a part of a debt, or of liquidated damages, is no satisfaction of the whole debt, even when the creditor agrees to receive a part for the whole and gives a receipt for the whole demand. But if a smaller sum is taken by way of compromise of a controverted claim, or from a debtor in failing circumstances, in full discharge of the debt, the partial payment is binding on the parties.¹²⁴ A plea of part payment operates as an extinguishment *pro tanto* and is not available as a set off.¹²⁵

761 Payment, pleading

A plea of payment may be pleaded orally, under West Virginia practice, with the bill of particulars which is required by statute.¹²⁶

762 Payment, plea (Maryland)

(Precede by general issue) And for their plea, the defendants say that before this action they fully satisfied and discharged the plaintiff's claim by payment.

(Virginia)

That before this action the plaintiff's claim was satisfied and discharged by payment.

763 Performance, estoppel

A refusal to perform a contract on one ground estops a party from basing his refusal upon another ground.¹²⁷

764 *Puis darrein* continuance; pleading, time

A plea *puis darrein* continuance may be filed at any time be-

¹²⁴ Curtiss v. Martin, 20 Ill. 557, 557 (1858).

¹²⁵ Solary v. Stultz, 22 Fla. 263, 269 (1886).

¹²⁶ National Valley Bank v. Houston, 66 W. Va. 342.

¹²⁷ Osgood v. Skinner, 211 Ill. 229, 237 (1904).

fore trial;¹²⁸ but it should be interposed as soon as the occasion therefor has arisen.¹²⁹

765 *Puis darrein* continuance; plea, requisites

The plea must show facts that have happened after the last continuance, and not before it;¹³⁰ it must also give the day of continuance, and the time and place where the matter of defense arose.¹³¹ Although in bar of the action this plea requires a verification.¹³² In Illinois, more than one plea *puis darrein* continuance is permitted in the same cause.¹³³ When properly pleaded this plea waives and supersedes all previous pleas and confesses the matter in dispute between the parties in so far as pleaded.¹³⁴ A plea of *puis darrein* continuance does not admit the truthfulness of an affidavit for a *capias ad respondendum*.¹³⁵

766 *Puis darrein* continuance, practice

At common law a new issue must be formed on a plea of *puis darrein* continuance by replication or otherwise, and this is true in Michigan notwithstanding the provision which abolishes special pleas and the provision which requires notice of special matter of defense.¹³⁶

767 Recoupment defined

The right of a defendant to show that the plaintiff did not sustain damages to the extent alleged, and thereby to reduce, abate, or altogether defeat his recovery, when the subject matter of the reduction springs immediately from the claim relied upon by the plaintiff, is denominated recoupment at common law.¹³⁷ In Michigan the right of recoupment has been extended to permit a recovery of a judgment the same as in case of set off.¹³⁸

¹²⁸ Robinson v. Burkell, 2 Seam. 278 (1840); East St. Louis v. Renshaw, 153 Ill. 491, 499 (1894); Ross v. Nesbit, 2 Gilm. 252 (1845); Kenyon v. Sutherland, 3 Gilm. 99 (1846).

¹²⁹ Souvais v. Leavitt, 53 Mich. 577, 580 (1884).

¹³⁰ Kenyon v. Southerland, 3 Gilm. 99, 103 (1846).

¹³¹ Ross v. Nesbit, 2 Gilm. 252, 357 (1845).

¹³² Mount v. Scholes, 120 Ill. 394, 399 (1887); overruling Robinson v. Burkell, 2 Seam. 278.

¹³³ Sec. 50, Practice act 1907, obviating, on this point East St. Louis v. Renshaw, 153 Ill. 491, 498, 499 (1894) and other cases.

¹³⁴ East St. Louis v. Renshaw, 153 Ill. 491, 498; Mount v. Scholes, 120 Ill. 394, 399.

¹³⁵ Van Norman v. Young, 228 Ill. 425, 428 (1907).

¹³⁶ Johnson v. Kibbee, 36 Mich. 269, 270 (1877).

¹³⁷ Ward v. Fellers, 3 Mich. 281, 286 (1854); M'Hardy v. Wadsworth, 8 Mich. 349, 354 (1860).

768 Recoupment distinguished

The common law recoupment differs from set off in that recoupment is confined to matters arising out of, and connected with, the transaction or contract upon which the suit is brought, in that it includes liquidated and unliquidated damages, in that the judgment for the defendant is not for an access of damages,¹³⁹ and in that the defense may be availed of under the general issue.¹⁴⁰

769 Recoupment; claims, nature

In recoupment, the opposing claims may be different in character, provided they arise out of the same subject matter and are susceptible of adjustment in one action.¹⁴¹ A claim originating in contract may be recouped against one founded in tort, and damages growing out of a tort may be recouped in a suit upon contract.¹⁴²

It is not necessary, in recoupment, as in set off, that the matter to be recouped shall arise between the same parties to the record provided the counter claims grow out of the same subject matter and are susceptible of adjustment in one action.¹⁴³ Damages which arise from a breach of an express or implied warranty in a contract forming the subject matter of the suit, are recoupable.¹⁴⁴ Damages which result from a breach of an implied warranty of quality are not recoupable in an action for the purchase price of an article, under a general agreement that the acceptance of the article shall be in full discharge of the contract, and there is a constructive acceptance of the article; as the acceptance waives the damages of such a breach.¹⁴⁵ Damages resulting from the wrongful prevention of the performance of a contract are not recoupable.¹⁴⁶

A party may set up by way of recoupment whatever he might have declared upon at the time of the pleading and he is not confined to the time of the commencement of the action.¹⁴⁷

¹³⁸ (10082), C. L. 1897 (Mich.).

¹³⁹ *Ward v. Fellers*, 3 Mich. 281, 287, 295 (1854).

¹⁴⁰ *Stow v. Yarwood*, 14 Ill. 424, 425 (1853).

¹⁴¹ *Streeter v. Streeter*, 43 Ill. 155, 161 (1867); *Stow v. Yarwood*, 14 Ill. 426.

¹⁴² *Streeter v. Streeter*, *supra*; *Stow v. Yarwood*, *supra*.

¹⁴³ *Waterman v. Clark*, 76 Ill.

428, 430 (1875); *Walker v. Chovin*, 16 Ill. 489, 491 (1855).

¹⁴⁴ *Commercial Realty & Construction Co. v. Dorsey*, 114 Md. 172, 177 (1910).

¹⁴⁵ *Wolf Co. v. Monarch Refrigerating Co.*, 252 Ill. 491, 508 (1911).

¹⁴⁶ *Stahelin v. Sowle*, 87 Mich. 124, 134 (1891).

¹⁴⁷ *Platt v. Brand*, 26 Mich. 173, 175 (1872).

This is a safe rule in recoupment, but not in set off, for the reason that in recoupment a counter claim must arise out of, or must be connected with, the subject matter of the suit and there is, therefore, no possibility of buying up claims that are unconnected with the subject matter of the litigation for the purpose of recouping them in a pending action and thereby avoiding a judgment for costs, as it is possible in set off if the foregoing rule would prevail there.

770 Recoupment, pleading

At common law it is not necessary to plead recoupment specially, but it may be availed of under the general issue.¹⁴⁸ In Illinois actions upon promissory notes, bonds, bills or other instruments in writing, a claim of recoupment must be specially pleaded.¹⁴⁹

A recoupment plea must be in bar of the entire cause of action and may be pleaded when the defendant's damages are equal to or greater than that claimed, but not when it is less than that which is demanded.¹⁵⁰

A plea or notice of recoupment must specify the breach of the contract or the violation of the duty complained of giving instances or acts, and it must show the damages sustained in consequence thereof.¹⁵¹ Generally, the recoupment plea or notice should allege every material fact that is necessary to make out a cause of action against the plaintiff. It should be as specific as a declaration.¹⁵² If damages are claimed for an improper performance of a contract, or for a failure to perform the contract within a time limit, all the facts and circumstances showing such damages must be fully and definitely stated.¹⁵³ A defendant is limited to the damages which are claimed by him.¹⁵⁴

¹⁴⁸ *Stow v. Yarwood*, 14 Ill. 425; *Streeter v. Streeter*, 43 Ill. 163; *Babcock v. Trice*, 18 Ill. 420, 421 (1857); *Addams v. Suver*, 89 Ill. 482, 483 (1878); *Wadhams v. Swan*, 109 Ill. 46, 62 (1884); *Commercial Realty & Construction Co. v. Dorsey*, 114 Md. 172 (1910); *Franklin v. Lilly Lumber Co.*, 66 W. Va. 164, 166 (1909).

¹⁴⁹ *Waterman v. Clark*, 76 Ill. 428, 431 (1875); Sec. 9, c. 98, *Hurd's Stat.* 1909, p. 1531.

¹⁵⁰ *Wadhams v. Swan*, 109 Ill. 62.

¹⁵¹ *Watkins v. Ford*, 69 Mich. 357, 359 (1888).

¹⁵² *Delaware & Hudson Canal Co. v. Roberts*, 72 Mich. 49, 50 (1888).

¹⁵³ *Darrah v. Gow*, 77 Mich. 16, 25 (1889); *Malthy v. Plummer*, 71 Mich. 578, 588 (1888).

¹⁵⁴ *Taylor v. Butters & Peters Salt & Lumber Co.*, 103 Mich. 1, 3 (1894).

771 Recoupment, judgment

At common law a defendant who avails himself of the right of recoupment is not entitled to judgment for an excess of damages found in his favor.¹⁵⁵ A judgment for defendant for an excess of damages in his favor is permissible under Michigan practice.¹⁵⁶

772 Release and discharge, practice

A release which has been obtained by duress of property is invalid and ineffectual as a defense.¹⁵⁷ A plea of release may therefore be defeated by a replication that the release was obtained by duress of property.¹⁵⁸ A release and discharge obtained after joinder of issue is inadmissible under the general issue, but must be shown under a plea of *puis darrein* continuance or a notice in the nature of such a plea.¹⁵⁹

773 Release of surety, pleading

The allowance and the acceptance of a discount for the settlement of differences arising in a guaranteed credit account, does not release the guarantor of the account.¹⁶⁰ Facts which constitute a release of surety must be specially pleaded.¹⁶¹ The release of a co-surety must be specially pleaded.¹⁶²

774 Res judicata, doctrine and application

Any fact or question which was actually or directly in issue and which was passed upon and determined by a court having jurisdiction to decide the controversy is forever settled between the parties to the suit and persons in privity with them in any subsequent collateral litigation, regardless of the form of the action.¹⁶³ The fundamental principle underlying the defense of *res judicata* is one of justice and public policy.¹⁶⁴

¹⁵⁵ Ward v. Fellers, 3 Mich. 281, 295 (1854); M'Hardy v. Wadsworth, 8 Mich. 349, 354 (1860); Stow v. Yarwood, 14 Ill. 424, 426 (1853).

¹⁵⁶ (19082), C. L. 1897 (Mich.).

¹⁵⁷ Spaulds v. Barrett, 57 Ill. 289, 293 (1870).

¹⁵⁸ Spaulds v. Barrett, *supra*.

¹⁵⁹ Souvais v. Leavitt, 53 Mich. 577, 579 (1884).

¹⁶⁰ Malleable Iron Range Co. v. Pusey, 244 Ill. 184, 197 (1910).

¹⁶¹ Commercial Loan & Trust Co.

v. Mallers, 237 Ill. 119, 121 (1908).

¹⁶² Rawlings v. Cole, 67 Mich. 431, 432 (1887).

¹⁶³ Chicago Terminal Transfer R. Co. v. Barrett, 252 Ill. 86, 93 (1911); Chicago v. Partridge, 248 Ill. 442, 446 (1911); Hanna v. Read, 102 Ill. 596, 603 (1882); People v. Amos, 246 Ill. 299, 303 (1910); Gray v. Gillilan, 15 Ill. 453, 455 (1854); Vanlandingham v. Ryan, 17 Ill. 25, 29 (1855).

¹⁶⁴ Hanna v. Read, 102 Ill. 596, 603 (1882).

The doctrine of *res judicata* is applicable to every matter which was actually determined in a former suit, and also to every other matter which necessarily might have been raised and determined in it.¹⁶⁵ It is limited to matters necessarily involved in the litigation, whether the ultimate vital or only incidental point was decided.¹⁶⁶ It has no application to matters of mere direction that have no effect upon the substantial rights of the parties.¹⁶⁷ It has no application against or in favor of anyone who is not a party or privy to the record.¹⁶⁸ The county clerk is in no proper sense a representative of the tax payer whose rights are not derived from him or dependent upon his acts.¹⁶⁹ The people are regarded as the real party to a proceeding which has the enforcement of public rights.¹⁷⁰ The doctrine of *res judicata* is alike applicable to law and equity.¹⁷¹ The defense of former adjudication may arise in three different ways: as an estoppel by judgment, as an estoppel by verdict, and as an estoppel against an estoppel.¹⁷²

775 *Res judicata*, burden of proof

The party who insist upon a former adjudication must bring himself within all of the elements that enter into the rule or doctrine of *res judicata*, before he can claim its benefit.¹⁷³ The similarity of the questions involved in the two proceedings may be shown by the record of the first suit or by extrinsic evidence, if that fact does not appear from the record.¹⁷⁴

776 *Res judicata*; pleading, waiver

Matter which constitutes *res judicata* must be specially pleaded or noticed, whether it be in a declaration, plea, or replication.¹⁷⁵

¹⁶⁵ *South Park Commissioners v. Montgomery Ward & Co.*, 248 Ill. 299, 310, 312 (1911).

¹⁶⁶ *Attorney General v. Chicago & Evanston R. Co.*, 112 Ill. 520, 539 (1884).

¹⁶⁷ *Mariner v. Ingraham*, 255 Ill. 108, 114 (1912).

¹⁶⁸ *People v. Amos*, 246 Ill. 299, 303 (1910).

¹⁶⁹ *People v. Chicago, Burlington & Quincy R. Co.*, 247 Ill. 340, 345 (1910).

¹⁷⁰ *People v. Harrison*, 253 Ill. 625, 629 (1912).

¹⁷¹ *People v. Harrison*, 253 Ill. 628.

¹⁷² *Chicago Theological Seminary v. People*, 189 Ill. 439, 443, 446 (1901); *Wright v. Griffey*, 147 Ill. 496, 498 (1893); *Hanna v. Read*, 102 Ill. 602.

¹⁷³ *Chicago v. Partridge*, 248 Ill. 442, 447, 448 (1911).

¹⁷⁴ *Chicago Terminal Transfer R. Co. v. Barrett*, 252 Ill. 86, 92 (1911).

¹⁷⁵ *Consolidated Coal Co. v. Peers*, 166 Ill. 361, 368 (1897); *Bryant v. Kenyon*, 123 Mich. 151, 154 (1900);

777 *Res judicata*; estoppel by judgment, generally

An estoppel by judgment is limited to judgments which involve a decision upon the merits of the controversy, whether the issue raised was by demurrer or plea.¹⁷⁶ A judgment upon a demurrer for defect in the pleadings as upon special demurrer, is no bar to another action for the same cause; but a decision upon the merits of a cause of action or defense, as upon general demurrer is a bar to a subsequent proceeding upon the same facts.¹⁷⁷ A former recovery is a good defense to a subsequent action notwithstanding the pendency of an appeal from the judgment or decree.¹⁷⁸ In an estoppel by judgment there must be, as between the actions, identity of parties, of subject matter, and of cause of action.¹⁷⁹ It is not the recitals of a judgment, but it is its effect which makes it *res judicata*.¹⁸⁰

778 *Res judicata*; estoppel by judgment, affirmance and reversal

A judgment of affirmance finally and conclusively puts an end to the controversy as to all objections actually made or which might have been made and as to the merits whether considered or not in the reviewing court.¹⁸¹ A judgment of reversal may constitute a bar or an estoppel to a subsequent proceeding if it is shown that it directly affirms or denies some distinct fact in issue; although as a general thing, a reversal simply nullifies a former judgment or decree, declaring that it shall henceforth be void.¹⁸² A reversal judgment is conclusive only of questions which were actually decided.¹⁸³ A judgment of an Illinois appellate court reversing a judgment of the trial court without remanding and containing a finding of facts, which is not appealed from, is a bar to a second suit upon the same cause of

Bateman v. Grand Rapids & Indiana R. Co., 96 Mich. 441, 443 (1893); Chicago Theological Seminary v. People, 189 Ill. 439, 447 (1901); Hahn v. Ritter, 12 Ill. 80, 83 (1850).

¹⁷⁶ Vanlandingham v. Ryan, 17 Ill. 25, 29 (1855).

¹⁷⁷ People v. Harrison, 253 Ill. 629; People v. Chicago, Burlington & Quincy Co., 247 Ill. 340, 344 (1910); Smalley v. Edey, 19 Ill. 207, 211 (1857).

¹⁷⁸ Moore v. Williams, 132 Ill. 589, 590 (1890).

¹⁷⁹ Chicago Theological Seminary v. People, 189 Ill. 443; Chicago v. Partridge, 248 Ill. 442, 446 (1911).

¹⁸⁰ People v. Whittaker, 254 Ill. 537, 541 (1912).

¹⁸¹ People v. Waite, 243 Ill. 156, 161 (1909).

¹⁸² Chicago Theological Seminary v. People, 189 Ill. 454.

¹⁸³ People v. Waite, 243 Ill. 156, 162 (1909).

action, although the appellate court judgment fails to recite that the appellant go hence without day, or that the appellee take nothing by his suit, or other words of like import showing a final disposition of the subject matter of litigation, which, by the common law, are necessary to a final judgment in a court of original jurisdiction.¹⁸⁴ In setting up a judgment of reversal and remandment as *res judicata*, the plea must specifically and not generally, allege the particular question upon which the benefit of the former decision is claimed.¹⁸⁵

779 *Res judicata*; estoppel by judgment, default judgment

A judgment recovered in a former action for want of a plea is *res judicata* upon all causes of action which were known to the judgment creditor at the time of the bringing of the action and which might have been included therein.¹⁸⁶

780 *Res judicata*; estoppel by judgment, dismissal of former proceeding

An order or judgment dismissing a proceeding for want of jurisdiction is not *res judicata* of a proceeding that is afterwards properly brought.¹⁸⁷

781 *Res judicata*; estoppel by judgment, erroneous judgment

The judgment is *res judicata* although it might be so erroneous that it would have been reversed on appeal or error.¹⁸⁸

782 *Res judicata*; estoppel by judgment, judgment against partner

A judgment recovered against one member of a partnership upon a partnership debt is a bar to a subsequent action against the other members of the firm, regardless of whether such members were out of the county at the time that the first suit was brought and the judgment was rendered. The Illinois provision of the statute which makes all joint obligations joint and several, has no application to partnerships.¹⁸⁹ Members of a firm

¹⁸⁴ *Larkins v. Terminal R. Ass'n.*, 221 Ill. 428, 434 (1906).

¹⁸⁵ *Chicago Theological Seminary v. People*, 189 Ill. 453.

¹⁸⁶ *Gaddis v. Leeson*, 55 Ill. 522, 525 (1870).

¹⁸⁷ *Lusk v. Chicago*, 211 Ill. 183, 190 (1904).

¹⁸⁸ *People v. Chicago, Burlington & Quincy R. Co.*, 247 Ill. 344.

¹⁸⁹ *Fleming v. Ross*, 225 Ill. 149 (1907).

who had been sued in an action in which one of them was served and judgment rendered, may be made parties to the judgment under special statutory provision.¹⁰⁰

783 *Res judicata*; estoppel by judgment, tax judgment

A judgment for taxes based upon an appearance and defense on the merits, has the same conclusive effect as any other judgment.¹⁰¹

784 *Res judicata*; estoppel by judgment, test case

A judgment in a suit or proceeding which was devised for the sole purpose of having a certain judgment entered, binds the parties to the scheme alone, and no one else.¹⁰²

785 *Res judicata*; estoppel by judgment, pleading

A former judgment based upon the same subject matter is inadmissible under the general issue and must be specially pleaded or noticed.¹⁰³

786 *Res judicata*; estoppel by judgment, plea, requisites

A plea of former recovery which seeks an absolute bar to a subsequent action must rest upon the sameness of the cause of action in both proceedings by showing identity of parties, of subject matter, and of cause of action;¹⁰⁴ it must aver the entry of a final judgment;¹⁰⁵ and it must state either the term of the court at which the judgment was recovered, or the exact date of its rendition; and when taken in vacation, the time of the entry of judgment by the clerk should be stated.¹⁰⁶

787 *Res judicata*; estoppel by judgment, pleas

(Commence as in Section 889) That heretofore the plaintiff and the said, in the said declaration mentioned,

¹⁰⁰ *Sherburne v. Hyde*, 185 Ill. 580 (1900).

¹⁰¹ *Neff v. Smyth*, 111 Ill. 100, 111 (1884).

¹⁰² *People v. Chicago, Burlington & Quincy R. Co.*, 247 Ill. 344.

¹⁰³ *Porter v. Leache*, 56 Mich. 40 (1885); *Briggs v. Milburn*, 40 Mich. 512, 514 (1879); *Tabor v. Van Vranken*, 39 Mich. 793, 794 (1878); *Gray v. Gillilan*, *supra*.

¹⁰⁴ *Wright v. Griffey*, 147 Ill. 496, 498 (1893); *Hanna v. Read*, 102 Ill. 602; *Grand Pacific Hotel Co. v. Pinkerton*, 217 Ill. 61, 80 (1905).

¹⁰⁵ *Collins v. Metropolitan Life Ins. Co.*, 232 Ill. 37, 48 (1908).

¹⁰⁶ *Mount v. Scholes*, 120 Ill. 394, 398, 399.

impleaded him, the defendant, in the court of county, in said state, to the term of said court, 19.., in a certain bill of complaint on the chancery side of said court, for not performing the very same promises in said declaration mentioned; and such proceedings were thereupon had in said bill, that afterwards, at the term of said court, 19.., by the consideration and decree of said court, the defendant was decreed to be indebted to the complainants in said bill for such non-performance of said promises, and said cause was thereupon referred to a master in chancery of said court for an accounting to ascertain the amount of such indebtedness. And such master, upon such accounting, found that the defendant was indebted to said complainants on account of the premises in the sum of \$., damages; and thereupon, upon the report of such finding to said court, said court confirmed said report, and by the consideration and judgment of the same court, a decree was entered, ordering, adjudging and decreeing that the defendant should pay complainants said sum, \$., and the costs of complainants in that behalf, as by the record thereof still remaining in said court, more fully appears. Which said judgment and decree still remains in full force and effect. And after the impleading of this defendant by said complainants in said court, and while an appeal from said judgment was pending in the appellate court in and for the district of said state, the death of the said complainant was suggested of record in the appellate court, and said cause thereupon proceeded in the name of said A. B., plaintiff in this suit, as survivor, and such proceedings were thereupon had in said appellate court, that such judgment and decree was at the term, 19.., affirmed, which said order of affirmance still remains in full force and effect. And this defendant thereupon paid and satisfied said judgment or decree of said court. (Conclude as in Section 892)

Estoppel by way of replication

(Commence as in Section 928) That on the day of, 19.., filed in the court of county, in the state of, their certain declaration against the said defendant in the action then pending in said court upon the law side thereof, and in which action the defendant was duly served with summons and appeared by counsel and filed its pleas to said declaration, and of which cause the court had full and complete jurisdiction of the persons of the plaintiffs and defendant and the subject matter; that said action was number in said court; that in and by the declaration and suit the said plaintiffs and set up the execution of the same lease upon which this suit is founded and therein sought to

recover rent due and owing from this defendant as tenant, to them as landlords by the terms of said lease for the period of time from to inclusive, which rent was due according to the terms of said lease and was unpaid.

That in said cause number the plaintiffs filed additional counts to the declaration by leave of the court upon the same lease to recover for the same rent due and owing by the defendant to the plaintiffs as was claimed in the original declaration, but by the additional counts the plaintiffs sought to set out more fully the execution of said lease by the lessors said and as landlords on the one part and this defendant as lessee and tenant on the other.

That in course of the proceeding in said cause, and pending a hearing thereof, departed this life and by his last will duly probated in the court of county on, his wife, and his daughter, were made executrixes of his estate and duly qualified as such, and pending said suit, also departed this life and by his last will and testament duly probated in the court of county, his wife was made sole executrix of his estate and she duly qualified in the court of county as such executrix, and still is the sole executrix of said last will and testament.

That the facts of the deaths of and were duly suggested in the court in said cause and the court duly entered an order substituting said executrix in place of the said and respectively as parties plaintiffs who are the same persons who are plaintiffs in this action and against the same defendant who is defendant in this action.

That the said defendant in said cause filed pleas to the original declaration: first, the general issue; secondly, a special plea, by the terms of which it pleaded that at the time of the making of the supposed lease, to wit, on the day of, the said one of the plaintiffs was the vice-president and general manager of the defendant; that the lease in said declaration mentioned was signed on behalf of defendant by the said as vice-president and general manager thereof, without the knowledge and consent or approval of the board of directors of the defendant; that the signing and execution of said lease on behalf of the defendant by the said with and for himself and the other plaintiffs therein, was unlawful and void and against public policy; that the same was in no manner ever ratified or confirmed by the board of directors or proper officials of said defendant or by any other persons thereto by the defendant lawfully authorized; that after the signing of said lease as aforesaid, and before the same was ever ratified or confirmed by the board of directors or other proper officers of said defendant, it, the defendant, on the day of,

19., vacated and removed from said premises and delivered up the possession which they, plaintiffs, have ever since and still hold: all of which the defendant was ready to verify and prayed judgment whether the plaintiffs ought to have their said action against it.

That upon the filing of the additional counts to the original declaration filed in said cause the defendant obtained leave of the court and re-filed said pleading and special plea to the said declaration as pleas to the additional counts filed by the plaintiffs, whereby the said special plea was pleaded to all of the plaintiffs cause of action.

That in said cause the plaintiffs filed their replication to the said pleas of the defendant as re-filed aforesaid, whereby the plaintiffs pleaded in reply to the general issue by the defendant, and they also filed their special replication to the special plea of the defendant aforesaid; and by the said special replication pleaded that by reason of anything in that plea alleged they ought not to be barred from having their aforesaid action because the said lease in said declaration described and mentioned was signed on behalf of said defendant by the said as vice-president and general manager thereof with the full knowledge and consent and approval of the board of directors of said defendant; that the signing and execution of said lease on behalf of said defendant by was lawful, valid and binding on said defendant, and was not signed on behalf of said defendant by the as aforesaid, without the knowledge and consent or approval of the board of directors of said defendant, and that the signing and execution of lease as aforesaid, was not unlawful and void and against public policy in manner and form as the defendant pleaded in said plea. Replying further, said plaintiffs, in said special replication pleaded that the said lease was duly ratified by the proper officials of said defendant thereto properly authorized by the defendant and that the defendant did not deliver up the possession of said premises to the plaintiffs after the signing of said lease as aforesaid and before the same was ever ratified by the board of directors or other officials for the said defendant in manner and form as the defendant pleaded in said special plea; and that the plaintiffs never accepted the surrender of said premises, or of said lease. And further replying, they pleaded in said replication, that the said defendant by its acts of its duly authorized officials recognized, ratified and confirmed said lease and occupied said premises under the terms and conditions of said lease and paid rent to the plaintiffs under the terms and conditions of said lease long after the said ceased to be manager or an official of the defendant company; that the premises were held by the defendant under said lease ever since the first day of the term in said lease mentioned until the end thereof; and that it paid rent for said premises in accordance with and under the terms and conditions of the said

lease mentioned until the first day of All of which the plaintiffs were ready to verify and prayed judgment for the damages set forth in the declaration.

This plaintiff says that the said cause came on to be tried in said court before the honorable, one of the judges thereof, at the term of said court, 19...; that a trial by jury was duly waived by the respective parties; that testimony was offered upon the issues presented by the plaintiffs; and that the court duly rendered a judgment in favor of the plaintiffs and against said defendant for the total sum of dollars for the rent accruing under the terms of said lease up to the time of the commencement of said action, with interest on the several instalments from the dates at which they severally became due to the day of the judgment rendered.

That in said cause the defendant in due season filed its motion for a new trial, and upon the same being overruled and denied by the court it presented and filed its bill of exceptions duly signed and sealed containing all of the evidence offered by either party and all of the proceedings in said trial, and it also filed its appeal bond, as is required by law and the court's order, and appealed the said cause to the appellate court for the district of Illinois; that the said appeal was duly perfected in said court as case number; that said appellate court had full jurisdiction of said cause on appeal and duly considered the said appeal; and that at its term, 19..., it found and adjudged that there was no error in said judgment and record in said court hereinbefore recited, and affirmed the said judgment of said court.

That thereupon, the said defendant appealed said cause from said decision and judgment of the said appellate court to the supreme court of Illinois and filed the necessary and proper bond and records, briefs and notice to give said court full jurisdiction of said appeal; that the said supreme court acquired and had jurisdiction of said cause at its term, 19..., case number; and, that said court duly considered said appeal and found and adjudged that there was no error in said record and judgment, and affirmed the said judgment of the court and the said judgment of said appellate court, so that the said judgment of the said court was and is final and conclusive of all matter of law and fact therein adjudicated, and has never been reversed or in any way impaired or modified: a copy of which said judgment is filed herewith.

That the said action was upon the same lease upon which the present suit is brought and was to recover rent due under the terms thereof from up to, being the amount of rent accrued and due under said lease at the time of the commencement of that suit.

That the present action is to recover the rent due under said

lease from to; that the questions as to the execution of said lease by the corporation, its consideration, the adoption and ratification of the same by the said corporation defendant, and as to its being the lease of the defendant and binding upon it were necessarily involved in said cause under the issue as made therein and were considered and determined by said court on the trial of said cause, and in the appellate and in the supreme courts respectively; that it was considered adjudged and determined by said court at its term, 19.., and said court did at said term determine and adjudge in said cause that the lease set up in said cause was the lease of the defendant duly executed by it, the said company, and ratified and adopted by it; that it was bound by the terms and conditions thereof and indebted to the plaintiffs for the rent accruing and accrued under the terms of said lease; and that it was in law bound to pay the same.

The questions as to the right of the plaintiffs to recover from said defendants of said lease for the rent accrued and to accrue and the acceptance of said lease and the occupancy of said premises by the defendant under the same were necessarily involved and decided in said action and the court did determine said questions and issues in favor of the plaintiffs and against the defendant, so that the defendant in this action is estopped from disputing the execution and validity of said lease as well as from disputing all right of the plaintiffs to recover the rent sued for in this action by reason of the invalidity of said lease.

Wherefore, they, the plaintiffs, plead said judgment and proceedings as an estoppel against the defendant, and pray that their damages as set forth in their declaration may be adjudged to them, etc.¹⁰⁷

.....
Plaintiff's attorney.

Judgment against partner

(Commence as in Section 887) That the notes declared and sued upon in said cause of action were each given for a partnership indebtedness of the firm of F. S. & R., and that said partnership was composed of the defendants herein, D. F., A. S. and this defendant, H. R., and that said notes and each of them were signed in the firm name of F. S. & R., and not in the individual names of the members of said firm; and that after the giving of said notes, one J. S., who was the husband of the said plaintiff, was the owner of said notes, and while he, the said J. S., was the owner of said notes, he, the said J. S., heretofore impleaded this defendant, H. R., in the court of county, in the state of at, to wit, the,

¹⁰⁷ Louisville, N. A. & C. Ry. Co.
v. Carson, 169 Ill. 247 (1897).

19..., term of said court in a plea of trespass on the case on promises, to the damage of the plaintiff of, to wit, \$....., for not performing the very same promises in said declaration mentioned; and that such proceedings were thereupon had in that plea, that afterwards and in to wit, said, 19..., term of said court of said county, in the state of by the consideration and judgment of said court, the said plaintiff, J. S., recovered against this defendant, H. R., the sum of, to wit, \$..... damages, as well as the costs of the plaintiff in that behalf, whereof this defendant, H. R., was convicted, as by the record thereof still remaining in said court more fully appears; which said judgment remains in full force and effect.¹⁹⁸ (Conclude as in Section 893)

788 Res judicata; estoppel by judgment, proof

Parol evidence is inadmissible to contradict a record which shows, on its face, the cause of action, the ground of defense, or other matter in question; such evidence is admissible, however, to identify the parties, the cause of action, the defense, or other litigated matter when these do not appear upon the record.¹⁹⁹ So, the presumption that an item of evidence formed a part of a general judgment may be overcome by parol proof.²⁰⁰

789 Res judicata; estoppel by verdict

An estoppel by verdict is where a second action is between the same parties or privies concerning the same subject matter but upon a different claim or cause of action, in which case the estoppel is conclusive only as to the matters in issue or upon controverted points settled by the finding of the verdict rendered in the original action irrespective of the question whether the cause of action is the same in both suits or not.

Upon such an estoppel the precise question adjudicated must clearly be shown, either by the record or by extrinsic evidence, the inquiry being not what might have been, but what was actually litigated and determined in the original suit. In case of doubt, as when a general verdict covering several issues was rendered, the whole subject matter of the action is at large and open for any new contention.²⁰¹ No estoppel by verdict exists

¹⁹⁸ Fleming v. Ross, 225 Ill. 149 (1907).

¹⁹⁹ Gray v. Gillilan, 15 Ill. 455; Rubel v. Title Guarantee & Trust Co., 199 Ill. 110, 114 (1902).

²⁰⁰ People v. Becker, 253 Ill. 131, 134 (1912).

²⁰¹ Chicago Theological Seminary v. People, 189 Ill. 443 *et seq.*; Chicago Title & Trust Co. v. Moody,

where the subject matter of the two proceedings is not the same, where the parties are different, and where the former case was decided under a materially different law.²⁰²

A general verdict and judgment based upon several distinct and separate defenses is *prima facie* evidence that all of the issues presented by the pleadings were found in the party's favor for whom the verdict was rendered, when the evidence was heard upon all of the issues thus presented; and the burden of proving that the verdict was rendered upon an issue which presented only a temporary bar, and that such a bar has since been removed, or has ceased to operate, devolves upon the opposite party.²⁰³ In Michigan the foregoing rule was rejected in a case which did not warrant its application, and this case should not, therefore, be considered as authority, or as decisive of the question.²⁰⁴

790 Res judicata; estoppel against estoppel

An estoppel against an estoppel is equivalent to no estoppel, as where a defendant sets up one judgment as an estoppel and the plaintiff replies with a later judgment as an estoppel against the defendant's judgment, the one estoppel neutralizes the other, and the whole question is left to be tried over.²⁰⁵ But this rule has no application to an estoppel of a judgment of an inferior court by an estoppel of a later judgment of a superior court. In estoppels of this kind the last judgment controls.²⁰⁶

791 Set-off defined

Set-off is a statutory remedy in the nature of a cross action, which permits a debt or demand to be set off against another and the recovery of a judgment by the party in whose favor a balance exists.²⁰⁷ A plea or notice of set-off is allowed for the purpose of setting up, by way of counterclaim, independent causes of action against the plaintiff.²⁰⁸ The items of set-off are regarded

233 Ill. 634, 636 (1908); Chicago v. Partridge, 248 Ill. 446.

²⁰² Park Ridge v. Wisner, 253 Ill. 434, 437 (1912).

²⁰³ Rhoads v. Metropolis, 144 Ill. 580, 587 (1891).

²⁰⁴ Hoffman v. Silverthorn, 137 Mich. 60, 65 (1904).

²⁰⁵ Chicago Theological Seminary v. People, 189 Ill. 446.

²⁰⁶ Chicago Theological Seminary

v. People, 189 Ill. 447; Bateman v. Grand Rapids & Indiana R. Co., 96 Mich. 41, 443 (1893).

²⁰⁷ Ward v. Fellers, 3 Mich. 281, 286 (1854); M'Hardy v. Wadsworth, 8 Mich. 349, 353 (1860); Pettis v. Westlake, 3 Seam. 535, 558 (1842); Peacock v. Haven, 22 Ill. 23 (1859).

²⁰⁸ Brennan v. Tietsort, 49 Mich. 397, 398 (1882).

as counts in a declaration.²⁰⁹ The object of a set-off is to inform the opposite party of the claim made therein and to limit the evidence thereto.²¹⁰

792 Set-off, law governing

At common law no set-off against a plaintiff's claim was permissible.²¹¹ The right to plead a set-off is governed by the law of the state where the action is brought.²¹²

793 Set-off; demand, nature

The demands subject to set-off are only such as are existing causes of action in the defendant's favor at the time the suit is commenced.²¹³ A claim which is not a subsisting cause of action in a party's own favor cannot be set off.²¹⁴ A debt or demand which has accrued, or a judgment which has been recovered after the bringing of the suit cannot be set off.²¹⁵ A demand which has grown out of a contract cannot be set off in an action upon a tort.²¹⁶ A demand, to be subject to set-off, must be mutual between the parties to the record, or the parties in interest, and in their own right.²¹⁷ An individual demand, therefore, cannot be set off against a joint demand of the plaintiff.²¹⁸ Nor can a joint indebtedness be set off against a separate demand.²¹⁹ A partner's individual indebtedness cannot be set off against an action based upon an indebtedness to the partnership of which the partner is a member.²²⁰ An individual indebtedness of an executor or an administrator cannot be set off against a debt due the estate.²²¹ A debt due from an intestate in his

²⁰⁹ *Mineral Point R. Co. v. Keep*, 22 Ill. 9, 19 (1859).

²¹⁰ *Walter Cabinet Co. v. Russell*, 250 Ill. 416, 420 (1911).

²¹¹ *Morton v. Bailey*, 1 Seam. 213 (1835).

²¹² *Leathe v. Thomas*, 218 Ill. 246, 252 (1905).

²¹³ *Pettis v. Westlake*, 3 Seam. 535, 538 (1842); *Kelly v. Garrett*, 1 Gilm. 649, 652 (1844).

²¹⁴ *Ayres v. McConnell*, 15 Ill. 230, 232 (1853).

²¹⁵ *Irvin v. Wright*, 1 Seam. 135 (1834); Sec. 47, Practice act 1907 (Ill.).

²¹⁶ *Stow v. Yarwood*, 14 Ill. 424, 426 (1853).

²¹⁷ *Peoria & Oquawka R. Co. v. Neill*, 16 Ill. 269, 271 (1855); Sec. 47, Practice act 1907 (Ill.); *Gregg v. Philips, Breese*, 143 (1825); *Burgwin v. Babcock*, 11 Ill. 28 (1849).

²¹⁸ *Priest v. Dodsworth*, 235 Ill. 613, 615, 616; *Heckenkemper v. Dingwehrs*, 32 Ill. 538, 540 (1863); Sec. 47, Practice act 1907 (Ill.).

²¹⁹ *Hilliard v. Walker*, 11 Ill. 644 (1850).

²²⁰ *Gregg v. James, Breese*, 143 (1825).

²²¹ *Wisdom v. Becker*, 52 Ill. 342, 346 (1869).

life time cannot be set off in an action upon a demand accruing to an administrator after the death of an intestate, as the allowance of the set-off would interfere with the *pro rata* distribution of the intestate estate in case of its insolvency.²²² In an action by or on behalf of an insolvent creditor, the defendant may set off a demand against the plaintiff subsisting at the time of the bringing of the suit, and thereby avoid the taking of a *pro rata* dividend upon such demand.²²³

794 Set-off; demands, judgments, appeal

A judgment which has been appealed from and stayed by *supersedeas* cannot be pleaded as a set-off, but the damages for which the judgment was obtained may be thus pleaded.²²⁴

795 Set-off; demands, judgment, domestic and foreign

Demands upon domestic or foreign judgments may be set off, under Illinois statute, against demands upon simple contracts.²²⁵

796 Set-off; demands, unliquidated damages

Unliquidated damages growing out of the same transaction are subject to set-off.²²⁶ Unliquidated damages which do not arise from, or which are not connected with, a covenant, contract, or tort sued upon, cannot be set off.²²⁷ This is so notwithstanding the present Illinois statute.²²⁸ Damages growing out of a breach of contract which are too remote and uncertain cannot be made the basis of a set-off.²²⁹ In actions upon a contract no set-off can be claimed for unliquidated damages resulting from a violation of an entirely distinct and independent contract in nowise connected with the contract sued upon.²³⁰ A claim for damages growing out of a breach of contract between third parties cannot be set off under an assignment from one of them, for

²²² Newhall v. Turney, 14 Ill. 338, 341 (1853).

²²³ Kelly v. Garrett, 1 Gilm. 649, 653 (1844).

²²⁴ King v. Bradley, 44 Ill. 342, 344 (1867).

²²⁵ Leathe v. Thomas, 218 Ill. 252.

²²⁶ Sanger v. Fincher, 27 Ill. 346, 348 (1862); Sec. 47, Practice act 1907 (Ill.).

²²⁷ De Forrest v. Oder, 42 Ill.

500 (1867); Hawks v. Lands, 3 Gilm. 227, 232 (1846).

²²⁸ Clause v. Bullock Printing Press Co., 118 Ill. 612, 617 (1886); Ewen v. Wilbor, 208 Ill. 492, 507 (1904); Higbie v. Rust, 211 Ill. 333, 338 (1904); Sec. 47, c. 110, Practice act 1907 (Ill.).

²²⁹ Williams v. Case, 79 Ill. 358, 358 (1875).

²³⁰ Higbie v. Rust, 211 Ill. 338.

the reason that the claim can be enforced only in the name of the assignor who cannot be a party to the record.²³¹

797 Set-off, nominal plaintiff

In actions which are prosecuted solely for another's benefit, a demand existing against the real party in interest, whether he is use plaintiff, or the party whom the plaintiff represents, may be set off.²³²

798 Set-off, pendency of action or appeal

The right of set-off is not affected by the pendency of an action for the claim to be set off or an appeal from a judgment thereon.²³³

799 Set-off, pleading and practice

In courts of record, including the probate court, a defendant is not bound to plead a set-off, the statute of set-off being merely permissive.²³⁴ But if pleaded, a set-off must be specially pleaded, or notice in writing of set-off must be given under the general issue.²³⁵ A notice of set-off is inappropriate without a plea of the general issue or that of payment in *ex contractu* actions. The notice and the plea must be filed together.²³⁶ The defense of set-off is pleadable orally, in West Virginia, provided a bill of particulars is filed under the statute to show the character and the amount of the set off.²³⁷

800 Set-off; plea, requisites

A plea of set-off must aver that the amount sought to be set off is still due and unpaid.²³⁸ A plea based upon unliquidated damages must, under Illinois statute, aver that the damages grew out of and were a part of the contract sued upon.²³⁹

²³¹ Zuckermann v. Solomon, 73 Ill. 130, 131 (1874).

²³² Rothschild v. Bruseke, 131 Ill. 265, 270.

²³³ Gaddis v. Leeson, 55 Ill. 522 (1870).

²³⁴ Morton v. Bailey, 1 Seam. 213 (1835); Sec. 47, Practice act 1907 (Ill.).

²³⁵ Cox v. Jordan, 86 Ill. 560, 562 (1877).

²³⁶ Bailey v. Valley National Bank, 127 Ill. 332, 336 (1889); Sec. 47, Practice act 1907 (Ill.).

²³⁷ National Valley Bank v. Houston, 66 W. Va. 336, 342 (1909).

²³⁸ De Forrest v. Oder, 42 Ill. 502; McCord v. Crooker, 83 Ill. 556, 561 (1876).

²³⁹ DeForrest v. Oder, 42 Ill. 502; Sec. 47, Practice act 1907 (Ill.); McCord v. Crooker, 83 Ill. 561.

801 Set-off; replication, requisites

A plaintiff has a right to reply a set-off against the defendant's set-off for the sole purpose of defeating that set-off, the latter set-off being considered as a cross action in which the plaintiff stands in the position of a defendant.²⁴⁰ A replication to a plea of set-off setting up matter of counter claim against the set-off must pray judgment as claimed in the declaration to avoid a departure.²⁴¹

802 Set-off, withdrawal

A court may, in its discretion, permit or refuse the withdrawal of a plea of set-off.²⁴²

803 Set-off, proof

A defendant is bound to prove his set-off to the same extent as he would have to prove the demand had he instituted an action upon it.²⁴³ He is also bound to prove the genuineness of his demand and that it was due and unpaid at the time of the commencement of the suit.²⁴⁴

804 Set-off, judgment

A defendant is entitled to judgment for whatever sum is found to be due him over and above the plaintiff's demand.²⁴⁵ Upon the plaintiff's set-off against a defendant's set-off, a plaintiff is not entitled to a judgment for the excess of his set-off over that of the defendant, for this would be a departure from the declaration.²⁴⁶

805 Stare decisis

The doctrine of *stare decisis* has no application to cases which have been wrongly decided and the parties are entirely different.²⁴⁷

²⁴⁰ Cox v. Jordan, 86 Ill. 560, 565 (1877); Sec. 47, Practice act 1907 (Ill.).

²⁴¹ Cox v. Jordan, *supra*.

²⁴² Mineral Point R. Co. v. Keep, 22 Ill. 9, 19 (1859).

²⁴³ Kelly v. Garrett, 1 Gilm. 649, 652 (1844).

²⁴⁴ Pettis v. Westlake, 3 Scam, 535, 538 (1842).

²⁴⁵ Sec. 47, Practice act 1907 (Ill.).

²⁴⁶ Cox v. Jordan, 86 Ill. 565.

²⁴⁷ Bay Island Drainage District v. Union Drainage District, 255 Ill. 194, 202 (1912).

806 Stated accounts, taxing districts

Settlements with taxing districts and reports to the governor are not stated accounts and final settlements between the state and the taxing districts, and will not preclude their examination and investigation, in the absence of contract or statute which expressly or impliedly requires the statement of accounts and their actual investigation and approval before settlement.²⁴⁸

807 Statute of limitations, waiver

A defendant waives his right to plead the statute of limitations by pleading to the merits without attaching a plea or notice claiming a bar of the action under the statute; and a court's denial of leave to interpose such a defense after a general issue alone has been pleaded is final and is not reviewable on appeal or error under Michigan practice.²⁴⁹

808 Statute of limitations, burden of proof

The statute of limitations is an affirmative defense and the burden of proving it is on the party pleading it.²⁵⁰ In Michigan the reverse is the rule. There, the plaintiff and not the defendant has the burden of proving that his action was commenced within the statutory period under a plea or notice of the statute of limitations.²⁵¹

809 Statute of limitations; pleading, time

A plea of the statute of limitations must be interposed at the earliest stage of the pleading which discloses its applicability.²⁵²

810 Statute of limitations; pleading, generally

The statute of limitations must be specially pleaded at common law or noticed.²⁵³ The defense of limitations cannot be raised by demurrer to a pleading even where it shows on its

²⁴⁸ *People v. Whittemore*, 253 Ill. 378, 383 (1912); Sees. 20, 21, art. 5, Const. 1870 (Ill.); Chapter 130, Rev. Stat. (Hurd's Stat. 1911, p. 2265).

²⁴⁹ *Ripley v. Davis*, 15 Mich. 75, 78 (1866); *Shank v. Woodworth*, 111 Mich. 642, 643 (1897).

²⁵⁰ *Schell v. Weaver*, 225 Ill. 159,

163 (1907); *Goodell v. Gibbons*, 91 Va. 608, 610 (1895).

²⁵¹ *Ayres v. Langdon*, 71 Mich. 594, 599 (1888).

²⁵² *Wiard v. Semken*, 8 Mackey, 475, 480 (D. C. 1891).

²⁵³ *Shank v. Woodworth*, 111 Mich. 642 (1897); *Whitworth v. Pelton*, 81 Mich. 98, 101 (1890).

face that the action is barred;²⁵⁴ nor can it be interposed by motion to dismiss.²⁵⁵

811 Statute of limitations; pleading, municipal corporations

The defense of the statute of limitations is available to municipal corporations.²⁵⁶

812 Statute of limitations; pleading, amended and additional counts

The statute of limitations is a good defense to a new cause of action which is stated for the first time in an amended or additional count and the period fixed by the statute of limitations has expired at the time such count has been filed, because as to such cause of action, the suit is regarded as having been commenced at the time of the filing of the amended or additional count: the statute of limitations is no defense to a re-statement of the cause of action which was previously stated in counts that were filed within the period of limitation.²⁵⁷ The omission from an additional or amended count of unessential matter does not constitute the statement of a new cause of action.²⁵⁸ An amended count or declaration does not state a new cause of action if it requires the same evidence to sustain it as it would have to be interposed under the original count or declaration.²⁵⁹ A defendant has a right to plead the statute of limitations without obtaining leave of court, to an amended count or declaration which presents a new cause of action.²⁶⁰ The allowance to

²⁵⁴ *Heimberger v. Elliot Frog & Switch Co.*, 245 Ill. 448, 450 (1910); *Peterson v. Manhattan Life Ins. Co.*, 244 Ill. 329, 333, 334 (1910); *Guntton v. Hughes*, 181 Ill. 132, 135 (1899); *Lesher v. United States Fidelity & Guaranty Co.*, 239 Ill. 502, 508 (1909); *Wall v. Chesapeake & Ohio R. Co.*, 200 Ill. 63, 67 (1902).

²⁵⁵ *Houghland v. Avery Coal & Mining Co.*, 246 Ill. 609, 619 (1910).

²⁵⁶ *Leroy v. Springfield*, 81 Ill. 114 (1876).

²⁵⁷ *Devaney v. Otis Elevator Co.*, 251 Ill. 28, 33 (1911); *Swift Co. v. Gaylord*, 229 Ill. 330, 332 (1907); *Kenneally v. Chicago*, 220 Ill. 485, 506 (1906); *Heffron v. Rochester German Ins. Co.*, 220 Ill. 514, 518

(1906); *Illinois Central R. Co. v. Cobb, Christy & Co.*, 64 Ill. 128, 140, 141 (1872); *Fish v. Farwell*, 160 Ill. 236, 247 (1896); *Gorman v. Newaygo Circuit Judge*, 27 Mich. 138, 140 (1873); *Richter v. Michigan Mutual Life Ins. Co.*, 66 Ill. App. 606 (1896); *Gorman v. Newaygo Circuit Judge*, *supra*; *Muren Coal & Ice Co. v. Howell*, 217 Ill. 190, 196 (1905); *Cicero v. Bartelme*, 212 Ill. 256, 260 (1904); *St. Louis Merchants' Bridge Terminal Ry. Ass'n. v. Schultz*, 226 Ill. 409, 413 (1907).

²⁵⁸ *Devaney v. Otis Elevator Co.*, 251 Ill. 28, 34.

²⁵⁹ *Swift Co. v. Gaylord*, 229 Ill. 330, 335 (1907).

²⁶⁰ *Maegerlein v. Chicago*, 237 Ill. 159, 164 (1908).

amend a declaration and the defendant's failure to object to the same will not preclude the defendant from afterward pleading the statute of limitations to the declaration.²⁶¹

813 Statute of limitations; plea, requisites, traverse

A plea of the statute of limitations merely asserts the statutory bar of limitations, without traversing or confessing and avoiding the cause of action.²⁶² As many pleas of the statute of limitations are necessary as there are counts in a declaration which allege separate and distinct causes of action that are barred.²⁶³ The plea is demurrable if it is interposed to all of the counts of a declaration and is a defense only to some of them.²⁶⁴

814 Statute of limitations; plea, requisites, period of limitations

A plea or notice of the statute of limitations must refer to the date or the time of the commencement of the suit and not to the time of the filing of the declaration or amended declaration.²⁶⁵

815 Statute of limitations; plea, requisites, statute, exception

A defendant who claims under a statute of limitations which is subject to an exception may rely upon the general provision of the statute, without also bringing himself within the exception.²⁶⁶

816 Statute of limitations; plea, requisites, rejection of claim, notice

A plea of limitations relying on the failure to bring suit within a certain period of the rejection of a claim must allege the giving of notice to the plaintiff of such rejection.²⁶⁷

817 Statute of limitations; plea, requisites, foreign judgment, residence

In Mississippi, a plea of the statute of limitations of three years against an action upon a foreign judgment must aver the

²⁶¹ *Heffron v. Rochester German Ins. Co.*, 220 Ill. 514, 518 (1906).

²⁶² *Wiard v. Semken*, 8 Mackey, 480.

²⁶³ *Pennsylvania Co. v. Sloan*, 125 Ill. 72, 81 (1888).

²⁶⁴ *Illinois Central R. Co. v. Swift*, 213 Ill. 307, 317 (1904).

²⁶⁵ *Wilcox v. Kassick*, 2 Mich. 165, 178 (1851).

²⁶⁶ *Armstrong v. Wilcox*, 57 Fla. 30, 34 (1909); *Hyman v. Bayne*, 83 Ill. 256, 264 (1876).

²⁶⁷ *Switchmen's Union v. Colehouse*, 227 Ill. 561 (1907).

residence of the defendant at the time of the institution of the suit.²⁶⁸

818 Statute of limitations; plea, requisites, amended declaration

A plea of the statute of limitations to an amended declaration need not expressly state that the original declaration failed to set forth a cause of action.²⁶⁹

819 Statute of limitations, replication

A plaintiff must reply to a plea of the statute of limitations by showing that the cause of action is within some of the exceptions to the statute, or by setting up matter which prevents a bar from attaching; he cannot avoid the statute by amending his declaration.²⁷⁰ A replication to a plea of the statute of limitations which is based upon fraud must set out clearly the facts and circumstances which amount, in law, to fraud; and if the replication fails to set out these facts, it is bad on demurrer.²⁷¹

820 Statutes, person objecting

The constitutionality of an act cannot be questioned by those whose rights the act does not affect.²⁷²

821 Statutes; objections, class legislation

A law which is general in its nature and uniform in its operation upon all persons coming within its scope is a general law.²⁷³ Laws may be passed which would be applicable only to members of a class, where the classification rests upon some disability, attribute or classification marking them as proper objects for the operation of such special legislation, unless expressly forbidden by the constitution.²⁷⁴ The legal profession constitutes

²⁶⁸ Marx v. Logue, 71 Miss. 905, 907 (1894); Par. 3104, Code 1906.

²⁶⁹ McAndrews v. Chicago, Lake Shore & Eastern Ry. Co., 222 Ill. 232, 240 (1906).

²⁷⁰ Gunton v. Hughes, 181 Ill. 132, 135 (1899); Leshner v. United States Fidelity & Guaranty Co., 239 Ill. 502, 509 (1909).

²⁷¹ Fortune v. English, 226 Ill. 262, 268 (1907).

²⁷² People v. Whittemore, 253 Ill. 378, 385 (1912); Tarantina v. Louisville & Nashville R. Co., 254 Ill. 624, 631 (1912).

²⁷³ Tarantina v. Louisville & Nashville R. Co., 254 Ill. 624, 630.

²⁷⁴ Standidge v. Chicago Rys. Co., 254 Ill. 524, 534 (1912); Rogers v. St. Louis-Carterville Coal Co., 254 Ill. 104, 109 (1912).

a special class for purposes of legislation.²⁷⁵ For the prevention of intoxication and disorderly or riotous conduct growing out of intoxication on railroad trains, it is reasonable to discriminate between passengers who ride in smoking, parlor, interurban or caboose cars and day coaches and those who ride in sleeping, dining and buffet cars.²⁷⁶

822 Statutes; objections, constitutionality, practice

The constitutionality of a statute may be raised by demurrer to a declaration founded upon a statute, or by an objection to evidence offered in support of such a declaration, or by an exception to an instruction based upon the unconstitutionality of the statute, and by motion for a new trial.²⁷⁷ The constitutionality of a statute must be first raised in the trial court; as it will be considered to have been waived, if not so raised.²⁷⁸

823 Statutes; objections, common law rights and powers, continuation

The constitutional recognition of the continuation of common law powers are operative until changed by the legislature.²⁷⁹

824 Statutes; objections, directory or mandatory, test

A provision of a statute is directory where no right of anyone interested is lost or prejudiced by the failure to perform the act or by the time when it is to be performed.²⁸⁰

825 Statutes; objections, legislative power

The legislature may pass any law and do any legislative act that is not prohibited by state or federal constitutions. An act of the legislature is regarded as within legislative power, unless there is reasonable doubt that it is beyond such power.²⁸¹

²⁷⁵ *Standidge v. Chicago Rys. Co.*, *supra*.

²⁷⁶ *Tarantina v. Louisville & Nashville R. Co.*, 254 Ill. 629; *Laws* 1911, p. 462.

²⁷⁷ *Christy v. Elliott*, 216 Ill. 31, 36, 39 (1905).

²⁷⁸ *Vermilion Drainage District v. Shockey*, 238 Ill. 237, 239 (1909);

Cummings v. People, 211 Ill. 392, 402 (1904).

²⁷⁹ *People v. McCullough*, 254 Ill. 9, 23 (1912).

²⁸⁰ *People v. Ellis*, 253 Ill. 369, 377 (1912).

²⁸¹ *People v. McCullough*, 254 Ill. 15, 16.

826 Statutes; objections, title

The object of the title of an act is to give such a general statement of the subject matter of the act that would include all provisions having a reasonable connection with the subject matter mentioned and a reasonable tendency to accomplish the purpose of the act, and not to state the reasons for the passage of the act or to give an index of its contents. Nor should the title cover every part of the subject which might come within the title.²⁸²

827 Statutes; objections, title, plea

(Commence as in Section 889) That the statute set forth in said count is unconstitutional and void, because it is in violation of that part of section thirteen, article four of the constitution of the state of Illinois which provides: (Insert constitutional provision), in that the subject of section, set forth in said count is not expressed in the title of the act of which it is a part, said title being, "An Act, etc., in the state of Illinois, and to provide for the enforcement thereof." (Conclude as in Section 892)

828 Statutes; construction, court's duty, scope

It is the duty of courts to sustain statutes which are susceptible of a construction that would render them valid, although another construction would render them invalid.²⁸³ Courts have no authority to inquire into the wisdom of legislative enactments.²⁸⁴

829 Statutes; construction, presumption

All presumptions are in favor of the validity of legislation.²⁸⁵

830 Statutes; construction, contemporaneous

No legislative or administrative contemporaneous construction can be claimed in defense of a provision of which the meaning is clear and unambiguous.²⁸⁶

²⁸² *Tarantina v. Louisville & Nashville R. Co.* 254 Ill. 628.

²⁸³ *Rogers v. St. Louis-Carterville Coal Co.*, 254 Ill. 104, 110, 111 (1912).

²⁸⁴ *People v. McCullough*, 254 Ill. 15.

²⁸⁵ *People v. McCullough*, *supra*.
²⁸⁶ *People v. Whittemore*, 253 Ill. 378, 384 (1912).

831 Statutes; construction, foreign laws

The decisions of the highest courts of foreign states upon similar provisions of the constitution and statutes are persuasive, but not conclusive.²⁸⁷

832 Statutes; construction, single and plural

Words which import the singular number may be extended or applied to several persons or things unless such construction is inconsistent with the manifest intention of the legislature or it is repugnant to the context of the same statute.²⁸⁸

833 Tender, unliquidated damages

Unliquidated damages cannot be made the subject of a tender at common law.²⁸⁹ A tender of a reasonable amount of money in payment of unliquidated damages is permitted by Illinois statute of 1891.²⁹⁰

834 Tender, amount

A tender must cover the entire indebtedness.²⁹¹ A tender made after suit brought must include a sufficient sum to cover all that the plaintiff has then a right to recover in debt, interest and costs.²⁹²

835 Tender; counting money, waiver

The actual counting of money is waived by making no request therefor.²⁹³

836 Tender; admission, scope

A defendant is concluded by the amount he tenders; which amount, neither a jury nor a judge can alter.²⁹⁴

²⁸⁷ First Congregational Church v. Board of Review, 254 Ill. 220, 225 (1912).

²⁸⁸ Chicago & W. I. R. Co. v. Heidenreich, 254 Ill. 231, 235 (1912).

²⁸⁹ Cilley v. Hawkins, 48 Ill. 308, 312 (1868).

²⁹⁰ Sec. 6, c. 135, Hurd's Stat. 1911 (Ill.).

²⁹¹ Cilley v. Hawkins, 48 Ill. 308, 312 (1868).

²⁹² Sweetland v. Tuthill, 54 Ill. 215, 216 (1870).

²⁹³ Conway v. Case, 22 Ill. 127, 138 (1859).

²⁹⁴ Monroe v. Chaldeck, 78 Ill. 429, 432 (1875); Cilley v. Hawkins, 48 Ill. 308, 312 (1868).

837 Tender, pleading

To relieve a party from costs a tender must be pleaded and the plea must be accompanied by a deposit in court of the amount admitted to be due.²⁹⁵ In Michigan a tender after the commencement of suit can only be made by tendering to the plaintiff or his attorney a sum of money claimed by the defendant to be due to the plaintiff; which tender does not bar the further prosecution of the suit, but has merely the effect of stopping interest and costs, and of subjecting the plaintiff to subsequent costs.²⁹⁶

838 Tender, plea

(Commence as in Section 889) That before the making and delivery of the said promissory note in the said declaration mentioned, to wit, on the day of, 19.., at the county of aforesaid, the said plaintiff, in consideration of the payment to him, by the said defendant, of the sum of dollars, by his certain bond or writing obligatory, bearing date the day and year aforesaid, and which is now here brought into court, sealed with the seal of the said plaintiff, acknowledged himself to be held and firmly bound unto the said defendant, in the penal sum of dollars, for the payment of which well and truly to be made he thoroughly bound himself, his heirs, executors and administrators, and every of them, to which said bond or writing obligatory there was and is annexed a recital and condition whereby it was recited that the said plaintiff had that day agreed to sell to the said defendant the following described lot or tract of land situated in the city of and county of and state of Illinois, known as lot in block in the original or old town of (now city of) on condition that the said defendant should pay to said plaintiff the sum of dollars, on or before the day of, 19.., at the bank in the city of aforesaid, for which the said defendant had given his promissory note; and it was provided that if the said defendant should pay said note at maturity without any delay or defalcation, and should, in the meantime, pay all taxes on said land, and the plaintiff should upon the completion of said payment, make, execute and deliver to the said defendant, a good and sufficient deed, with full and proper covenants of warranty, free and clear of all incumbrance, then the said bond or writing obligatory should be void, otherwise it should remain in

²⁹⁵ Warth v. Loewenstein, 219 Ill. 222, 228 (1906).

²⁹⁶ Snyder v. Quarton, 47 Mich.

211, 212 (1881); (10405), (10406), C. L. 1897 (Mich.).

full force and virtue; and that time should be deemed material and of the essence of the contract in said bond set forth. And the said defendant avers that he then and there paid to the said plaintiff the said sum of dollars and made and delivered to the said plaintiff his promissory note for the said sum of dollars, payable on or before the day of, 19.., which was the same note mentioned in the said bond or writing obligatory, and in the said plaintiff's declaration herein, and was made and given for the consideration aforesaid, and none other.

And the said defendant further avers, that he paid, and was willing and liable to pay, all taxes on said land, between the day of the date of the said bond or writing obligatory and the day of, 19.., and on the said last mentioned day, was ready and willing, and offered to pay to said plaintiff at the said bank, in the said city and county of, the said sum of dollars, and then and there tendered the said last mentioned sum of money to the said plaintiff, but the said plaintiff then and there neglected and refused, and hath ever since neglected and refused, to make, execute and deliver to the said plaintiff a good and sufficient deed of said lot or tract of land, with full and proper covenants of warranty, and free and clear of all incumbrance; but on the contrary thereof, the said defendant avers that at the time and place last aforesaid, the said lot or tract of land was, and for a long space of time before had been, subject to the incumbrance of a certain mortgage made and executed by the said plaintiff and his wife, to, bearing date the day of, 19.., to secure the payment to the said by the said plaintiff, in years from the date of said mortgage, the sum of dollars, with interest at the rate of per centum per annum, which said mortgage was duly filed for record in the recorder's office of said county of on the day of, 19.., and recorded in said office in book of mortgages, at page, and on the said day of, 19.., was not canceled, released or discharged of record, but there remained, and was a subsisting and valid lien upon said lot or tract of land, to wit, at the county aforesaid.²⁹⁷ (Conclude as in Section 892)

839 Tender; replication, non est factum

²⁹⁸ That the said writing obligatory in said plea mentioned, was not nor is the deed of said plaintiff.

²⁹⁷ Conway v. Case, 22 Ill. 127 (1859).

²⁹⁸ Commence and conclude as in Section 928.

840 Tender; replication, payment

²⁹⁸ That at the said time when, etc., where, etc., the said defendant did not pay to said plaintiff the said sum of dollars, as said defendant hath in his said plea alleged.

841 Tender; replication, payment of taxes

²⁹⁸ That the said defendant did not pay all taxes on said land between the day of the date of said bond or writing obligatory and the day of, 19.., as by the said plea is alleged.

842 Tender; replication, incumbrance

²⁹⁸ That said mortgage made and executed by said plaintiff and his wife to at the said time when, etc., where, etc., was not a subsisting and valid lien upon the lot or tract of land in said plea mentioned, as in said plea is alleged.

843 Tender; replication

²⁹⁸ That at the same time when, etc., and at the place when, etc., as in said plea mentioned, the said defendant did not tender to the said plaintiff the said sum of dollars, as in and by his said plea the said defendant hath alleged.

844 Tender; notice with general issue

(Precede this by plea of general issue)

To plaintiff:

You will please take notice that on the trial of this cause, the said defendant will give in evidence and insist, in his defense, that before the commencement of this suit, to wit, on the day of, 19.., at, and again on, to wit, the day of, 19.., at, the said defendant was ready and willing and then and there tendered and offered to pay to said plaintiff the sum of dollars, lawful money, as to the claim alleged in said plaintiff's declaration in this cause; to receive which of said defendant, the said plaintiff then and there wholly refused and always, from the time of the accruing of said claim to the said plaintiff, the said defendant has been ready and willing, and still is ready and willing, to pay the said sum of money to the said plaintiff, and now brings the same with interest thereon into court, ready to pay to the said plaintiff if he will accept the same.

Dated, etc.

²⁹⁸ Commence and conclude as in Section 928.

845 Tender; acceptance and waiver

The plaintiff now, in open court, waives and releases any other damages claimed in the declaration than as to the sum of alleged by the defendant, in his plea to be tendered and brought into court; but as to said sum of the plaintiff accepts, and asks judgment for said amount.

846 Title, landlord and tenant

In actions based upon the relation of landlord and tenant in undisturbed possession, the landlord's title cannot be controverted by the tenant.²⁹⁹

847 Title; vendor and vendee, pleading

A substantial defect in a title must be specially pleaded or noticed and proved in an action for the purchase price brought by the vendor of real property.³⁰⁰

848 Title; plea, requisites

A plea of failure of title must aver specifically the manner in which the title has failed, and why.³⁰¹

849 Ultra vires

An agreement of a corporation which is beyond its corporate powers is absolutely void and cannot be ratified, nor can it become valid by acquiescence of either party.³⁰²

850 Unproved counts, practice

It is proper practice for the trial court, when requested so to do, to withdraw defective or unsupported counts from the consideration of the jury, where a declaration consists of more than one count and some of them fail to state a cause of action, or they are unsupported by any evidence which would fairly tend to prove them; but a refusal of the court to grant the request is no reason for a reversal of the judgment when there are other proved counts in the declaration which are

²⁹⁹ *Griffing Bros. Co. v. Winfield*, 53 Fla. 589 (1907).

³⁰⁰ *Dwight v. Cutler*, 3 Mich. 566, 577 (1855).

³⁰¹ *Wisdom v. Becker*, 52 Ill. 342, 344 (1869).

³⁰² *Converse v. Emerson, Talcott & Co.*, 242 Ill. 619, 627 (1909).

sufficient to sustain the verdict.³⁰³ The absence of evidence which would fairly tend to prove a count or counts and to sustain a judgment thereon, authorizes the giving of an instruction to disregard the unproved count or counts; but the court has no power to dismiss such counts from the declaration.³⁰⁴

851 Usury, generally

To constitute usury, there must be a borrowing and lending of money or the forbearance of a pre-existing debt.³⁰⁵ A surety on a usurious note has a right to interpose the defense of usury.³⁰⁶ By special statutory provision in Illinois the defense of usury must be specially pleaded.³⁰⁷

852 Usury, burden of proof

The burden of proving usury is upon the party who urges it as a defense.³⁰⁸

853 Usury; plea, requisites

The defense of usury is in the nature of a penal action, requiring strictness in pleading it. The plea should show clearly that the defense comes within the statute.³⁰⁹ Facts wherein the usury consists must be stated in the plea.³¹⁰ A plea of usury setting forth a forbearance of a pre-existing indebtedness, should state specifically the amount forborne, the time of forbearance, and how much was paid, or agreed to be paid, by way of interest for the forbearance, so that the court could determine, from the face of the plea, whether there is usury in the transaction.³¹¹ In Illinois a plea of usury must not profess to answer the whole cause of action, because the defense

³⁰³ *Klofski v. Railroad Supply Co.*, 235 Ill. 146, 149 (1908).

³⁰⁴ *Pittman v. Chicago & Eastern Illinois R. Co.*, 231 Ill. 581, 585 (1908); *Kennedy v. Aetna Life Ins. Co.*, 242 Ill. 396, 400 (1909).

³⁰⁵ *Hancock v. Hodgson*, 3 Scam. 329, 333 (1841).

³⁰⁶ *Safford v. Vail*, 22 Ill. 326 (1859).

³⁰⁷ Sec. 7, c. 74, Rev. Stat. (Hurd's Stat. 1911, p. 1406); *Partlow v. Williams*, 19 Ill. 132 (1857); *Smith v. Whitaker*, 23 Ill. 367 (1860).

The Illinois decisions on the necessity of pleading usury apparently are conflicting because some of them were based upon laws requiring the pleading of usury and others were decided under laws which did not require pleading.

³⁰⁸ *Walker v. Lovitt*, 250 Ill. 543, 550 (1911).

³⁰⁹ *Hancock v. Hodgson*, 3 Scam. 329, 333.

³¹⁰ *Durham v. Tucker*, 40 Ill. 519, 522 (1866).

³¹¹ *Hancock v. Hodgson*, *supra*.

of usury is given only to the extent of the usurious portion of the indebtedness.³¹²

854 Usury; notice with general issue (Mich.)

³¹³ To.....

Attorney for said plaintiff:

You will please take notice that on the trial of this cause, the said defendant will give in evidence and insist in his defense that a greater rate of interest than is allowed by law was reserved in the contract and promises alleged in plaintiff's declaration and that said contract and promises are tainted with usury and are unenforceable as to that part thereof, which represents the usurious interest, and as to any interest at the option of this defendant, and this defendant elects to so treat and consider the same because of the usury therein countenanced, permitted and practised, and will insist that no interest be allowed said plaintiff, and that the \$. or \$. mentioned in section of the contract set up in plaintiff's declaration cannot be recovered being usurious interest under the laws of the state of Michigan.

Dated, etc.³¹⁴

855 Validity of contract, pleading

The validity of a contract cannot be insisted upon under the general issue, but must be specially noticed.³¹⁵

856 Voluntary assignment; discontinuance, replication

(Commence as in Section 928) That he never at any time received from said, assignee, or from any other source on behalf of said pretended any portion of the said sums so due to him as aforesaid, and that after the said filing with said, assignee of said pretended, of the said verified claim of said plaintiff, to wit, on the day of, 19..,, a final order or judgment was duly, legally and in accordance with the statute in such case, entered by the county court of county in the matter of the voluntary assignment of said pretended, then pending in said court, by which said order or judgment all proceedings in the matter of said assignment were discontinued upon the assent in writing of the said pretended and a majority of its creditors in num-

³¹² Moir v. Harrington, 22 Ill. 40 (1859); Nichols v. Stewart, 21 Ill. 106 (1859).

³¹³ Precede this by plea of general issue.

³¹⁴ Rosen v. Rosen, 159 Mich. 72 (1909).

³¹⁵ Hermann & Co. v. People's Department Store, 160 Mich. 224 (1910); Circuit Court Rule 7e.

ber and amount, and all parties were, thereby and by force of the statute in such cases made and provided, remitted to the same rights and duties as existed at the date of the said assignment, except in so far as said estate of said insolvent had then already been administered upon and disposed of, as by the record and proceedings in said matter of the voluntary assignment of said pretended now remaining in the said county court of county, more fully appears; which said order or judgment still remains in full force and effect, not reversed, appealed from, vacated or modified. And this the said plaintiff is ready to verify by the said record when, where and in such manner as the court shall direct, and he prays that said record may be seen and inspected by the court.

.....
Attorney for plaintiff.

GENERAL ISSUE

857 General issue defined

Any plea which puts in issue the entire count or record sued upon is the general issue.³¹⁶

858 General issue, constructive

A plaintiff will be considered to have consented to try a case the same as if a general issue had been filed if he waives the right to take default or to rule the defendant to plead.³¹⁷

859 General issue, waiver

The sufficiency, in law, of the declaration is admitted by pleading the general issue, or by pleading the general issue after the overruling of a demurrer, unless the declaration states a defective cause of action.³¹⁸ Duplicity in a declaration is waived by pleading the general issue.³¹⁹

³¹⁶ *Compton v. People*, 86 Ill. 176, 178 (1877).

³¹⁷ *First National Bank v. Miller*, 235 Ill. 135, 139 (1908).

³¹⁸ *Wenona Coal Co. v. Holmquist*, 152 Ill. 581, 591 (1894); *Chicago City Ry. Co. v. Jennings*, 157 Ill. 274, 282 (1895); *Chicago, Rock Island & Pacific Ry. Co. v. People*, 217 Ill. 164, 172 (1905); *Klofski v. Railroad Supply Co.*, 235

Ill. 146, 150 (1908); *Quincy Coal Co. v. Hood*, 77 Ill. 68, 70 (1875); *American Express Co. v. Pinckney*, 29 Ill. 392, 405 (1862); *Fuller v. Jackson (City)*, 82 Mich. 480, 482 (1890); *Grand Rapids & Indiana R. Co. v. Southwick*, 30 Mich. 444, 446 (1874).

³¹⁹ *Chicago West Division Ry. Co. v. Ingraham*, 131 Ill. 659, 665, 666 (1890).

860 General issue; nature and scope, generally

The filing of the general issue to the entire declaration traverses every material allegation contained in every count; it puts the plaintiff upon proof of his cause of action; and it prevents him from taking default or judgment upon any count of his declaration until the entire issue is tried.³²⁰ Any matter which tends to show that the plaintiff never had a cause of action may be introduced under the general issue.³²¹ As a general rule, the defendant may deny or prove, under the general issue, whatever a plaintiff is obliged to prove as an essential part of his own case.³²² If any material allegation requires a decision upon a question of law, an issue or question of law can thus be raised indirectly by the plea of the general issue.³²³

861 Estoppel in pais

Acts and declarations of which the injurious consequences might, and ought to have been foreseen, and upon which others may act to their prejudice, cannot be restricted by those who made them if the persons to whom, or for whose benefit the declarations are made acted upon them in good faith and thereby changed their situation so that injury would result were a retraction permitted. Neither the plaintiff nor the defendant, is therefore, permitted to insist upon that which is inconsistent with what he has said or done, and which affects the rights of others.³²⁴ An estoppel *in pais* as a defense to an action at law need not be specially pleaded or noticed.³²⁵

862 Fraud

In actions upon simple contracts, evidence of fraud in their procurement is admissible under the general issue,³²⁶ but such evidence is inadmissible in actions upon sealed instruments.³²⁷ Under the general issue and an affidavit denying the execu-

³²⁰ *Van Dusen v. Pomeroy*, 24 Ill. 289, 290, 291 (1860).

³²¹ *Curtiss v. Martin*, 20 Ill. 557, 571 (1858); *Wolf v. Powers*, 241 Ill. 9, 13 (1909); *Biederman v. O'Conner*, 117 Ill. 493, 497 (1886).

³²² *Edwards v. Chandler*, 14 Mich. 471, 475 (1866).

³²³ *Wolf v. Powers*, 241 Ill. 13.

³²⁴ *Knoebel v. Kircher*, 33 Ill. 308,

316 (1864); *Illinois Fire Ins. Co. v. Stanton*, 57 Ill. 354, 362 (1870).

³²⁵ *Dean v. Crall*, 98 Mich. 591, 594 (1894).

³²⁶ *Dillon Beeb's Son v. Eakle*, 43 W. Va. 502, 512 (1897).

³²⁷ *National Valley Bank v. Houston*, 66 W. Va. 336, 347 (1909); *Columbia Accident Ass'n v. Rockey*, 93 Va. 678, 684 (1896).

tion of the instrument sued upon, fraud may be shown in obtaining the signature to the instrument.³²⁸

863 Letters of administration

The failure to obtain letters testamentary or that of an administrator may be shown under the general issue.³²⁹

864 Misjoinder and nonjoinder of plaintiffs

At common law a defendant may show under the general issue in actions *ex contractu* that too few or too many persons are joined as plaintiffs.³³⁰ This rule holds good in Illinois notwithstanding the statutory provision which dispenses with proof, under the general issue, of the joint rights as copartners, payees, or obligees; as this provision is restricted to a plaintiff's proof and not to that of a defendant.³³¹ In actions in form *ex delicto* for the recovery of damages as distinguished from actions for the recovery of the specific property, the nonjoinder of plaintiffs is available only to lessen the plaintiff's damages, for the reason that the defendant is still liable to a second action by the parties who are not joined in the action for a recovery of their portion of the loss.³³²

865 Plaintiff's character and capacity

Pleading the general issue admits the character in which a plaintiff sues.³³³ The plaintiff's capacity to sue as an individual cannot be questioned under the general issue.³³⁴

866 Statute of frauds

A verbal or oral acceptance of a written order on a third person and the payment of a portion of the amount called for by the order, do not take the promise to pay the balance out of the statute of frauds.³³⁵ On the principle that the general issue places the plaintiff upon proof of a valid contract, or of a

³²⁸ *Soper v. Peck*, 51 Mich. 563, 566 (1883).

³²⁹ *McLean County Coal Co. v. Long*, 91 Ill. 617, 621 (1879).

³³⁰ *Snell v. DeLand*, 43 Ill. 323, 326 (1867).

³³¹ *Snell v. DeLand*, 43 Ill. 325; *Lasher v. Cotton*, 225 Ill. 234, 236 (1907).

³³² *Johnson v. Richardson*, 17 Ill. 302, 304 (1855).

³³³ *McKinley v. Braden*, 1 Scam. 64, 67 (1832).

³³⁴ *McIntire v. Preston*, 5 Gilm. 48, 58 (1848).

³³⁵ *Chicago Heights Lumber Co. v. Miller*, 219 Ill. 79, 82 (1905).

transaction which renders the defendant liable, the defense of the statute of frauds is open under the general issue.³³⁶ A rule of court requiring notice of fraud to be given with the general issue has no application to pleading or noticing the defense of the statute of frauds, which defense may be interposed without special pleading or any notice to the general issue.³³⁷

867 Pleading and demurring

It is not permissible to plead the general issue to the entire declaration and afterwards to demur to a part or count thereof.³³⁸

868 Plea of general issue (Michigan)

And now comes the defendant above named, by , his attorney, and demands a trial of the matter set forth in the plaintiff's declaration.

Dated, etc.³³⁹

.....
Attorney for defendant.

(West Virginia)

It is customary, in West Virginia, to plead orally the general issue, such as not guilty, *non assumpsit*, and conditions performed, and to note its filing alone upon the docket or record.³⁴⁰

NOTICE UNDER GENERAL ISSUE

869 Notice, nature and effect

A distinction is recognized between a special plea and a notice given with the general issue in their objects and tests of sufficiency. The objects of a special plea are to apprise the plaintiff of the nature of the defense relied upon in order to prevent his surprise on the trial and to form a distinct issue of law or fact; the test of its sufficiency is whether the facts stated in the plea

³³⁶ and ³³⁷ *Third National Bank v. Steel*, 129 Mich. 434, 438 (1902); Circuit Court Rule 7b, c. (Mich.).

³³⁸ *Hawks v. Lands*, 3 Gilm. 227, 230 (1846).

³³⁹ This form is applicable to all civil actions. It is not necessary to sign a plea where a notice has been added to the plea and the no-

tice has been properly signed. The business address of the defendant's attorney is required by Circuit Court Rule 7a, unless the address has been previously given in a notice of retainer.

³⁴⁰ *National Valley Bank v. Houston*, 66 W. Va. 336, 341 (1909).

are sufficient to support a judgment without resorting to intentions except those which necessarily arise from the facts admitted by a general demurrer. Whereas the object and test of the sufficiency of a notice under the general issue are not always the same and depend upon the statute in each particular case.³⁴¹ Thus, under Michigan practice and since the revision of 1846, the sole object of a notice required to be filed with the general issue is to apprise the plaintiff of the nature of the defense that he might be prepared to meet it, and to avoid surprise on the trial, but no issue can be made under it other than that raised by the general issue.

A notice is not a pleading; it is not to be tested by the rules that are applicable to pleas; and no issue of fact or law can be founded upon it.³⁴² A notice which is filed with the general issue, not being a pleading, it cannot be traversed or answered as such.³⁴³ The test of the sufficiency of such a notice in Michigan is not whether the facts that are alleged therein are sufficient upon general demurrer, as it is in Illinois, but whether the plaintiff could with reasonable certainty anticipate the matter of the defense which is sought to be interposed by the notice; and its effectiveness is determined upon the trial by the admission or the rejection of evidence under it.³⁴⁴ The accuracy of a special plea is not required of a notice of special defense.³⁴⁵ This test is applicable to all forms of actions.³⁴⁶ A notice which may be given under the general issue cannot be made to take the place of special pleas of *non est factum* nor that of *nul tiel* corporation.³⁴⁷

870 Notice, scope, Michigan

By the revision of 1846 special pleading is absolutely forbidden, and instead a notice should be added to the general issue wherever a special plea would have been necessary under the former practice.³⁴⁸ All affirmative defenses in avoidance of the

³⁴¹ *Rosenbury v. Angell*, 6 Mich. 508, 514 (1859).

³⁴² *M'Hardy v. Wadsworth*, 8 Mich. 349, 361 (1860).

³⁴³ *Burgwin v. Babcock*, 11 Ill. 28, 30 (1849).

³⁴⁴ *Rosenbury v. Angell*, 6 Mich. 508, 514 (1859); *Briesenmeister v. Knights of Pythias*, 81 Mich. 525, 533 (1890).

³⁴⁵ *Farmers' Mutual Fire Ins. Co. v. Crampton*, 43 Mich. 421 (1880).

³⁴⁶ *Cresinger v. Reed*, 25 Mich. 450, 454 (1872).

³⁴⁷ *Bailey v. Valley National Bank*, 127 Ill. 332 (1889); Sec. 46. Practice act 1907 (Ill.).

³⁴⁸ *Cresinger v. Reed*, 25 Mich. 450, 454 (1872).

cause of action, such as payment, release, satisfaction and discharge, non-delivery, statute of limitations, fraud, partial or entire failure of consideration, all matters which are in no way connected with the plaintiff's affirmative case, and all defenses which are specially pleadable at common law, must be set forth in a notice added to the general issue under Michigan practice.³⁴⁹

871 Notice, admission

All facts that are set forth in a notice of special defense filed with the general issue are admitted by the defendant and require no proof by the plaintiff.³⁵⁰

872 Notice, general form (Michigan)

To

Attorney of record, or the plaintiff in the above cause:

You will please take notice that on the trial of this cause, the defendant under plea of general issue will introduce affirmative evidence to show that (Set forth special matter of defense).

By.....

Defendant's attorney.

BILL OF PARTICULARS

873 Nature and scope

The object of a bill of particulars is to inform the defendant of the claim he is called upon to defend, and its effect is to limit and restrain the plaintiff on the trial to the proof of the particular cause or causes of action therein mentioned.³⁵¹ The proof must correspond with the allegations and the bill of particulars.³⁵² A party will not be permitted to recover a greater amount than that claimed in his bill of particulars.³⁵³

874 Application, demand or motion, nature

A motion for a bill of particulars is in the nature of a dilatory motion and must be made at the first opportunity. It should be

³⁴⁹ Circuit Court Rule 7b, c.—; Bryant v. Kenyon, 123 Mich. 151, 154 (1900); Rosenbury v. Angell, 6 Mich. 513.

³⁵⁰ Buckeye Brewing Co. v. Eymer, 157 Mich. 518, 521 (1909); Circuit Court Rule 7e; Comstock v. Taggart, 156 Mich. 47, 53 (1909).

³⁵¹ McKinnie v. Lane, 230 Ill. 544, 548 (1907).

³⁵² Lovington v. Adkins, 232 Ill. 510, 516 (1908).

³⁵³ Morton v. McClure, 22 Ill. 257 (1859); Sec. 32, Practice act 1907.

made before pleading in bar to the action. A motion for a rule to make a count more specific, however, may be made at any time before trial.³⁵⁴

875 Requisites

A bill of particulars of a sale need not state the purchaser's name nor that the name of the purchaser is unknown.³⁵⁵

876 Amendment

A bill of particulars is amendable.³⁵⁶

GROUND OF DEFENSE

877 Defenses, limitation, waiver

The limitation to the grounds of defense filed is removed and waived by a plaintiff who offers evidence which bears upon another and distinct ground of defense from that which has been filed.³⁵⁷

PRACTICE

878 Pleading, time

In all suits commenced by declaration a defendant, in Michigan, may plead within fifteen days after personal service upon him of a copy of the declaration and the notice of rule to plead.³⁵⁸ The defendant has full fifteen days within which to plead any plea he deems advisable, notwithstanding the existence of a general rule of court giving a shorter period of time to plead certain pleas.³⁵⁹

879 Extension of time, motion

And now come the defendant by attorney , , and move the court for an order herein granting an extension of time to the said defendant of days in which to plead or demur to the plaintiff declaration.

And for the reasons for this the defendant motion, by said attorney , it says:

³⁵⁴ *McCarthy v. Mooney*, 41 Ill. 300 (1866).

³⁵⁵ *People v. Zito*, 237 Ill. 434, 440 (1909).

³⁵⁶ *McKinnie v. Lane*, 230 Ill. 544, 548 (1907).

³⁵⁷ *Metropolitan Life Ins. Co. v. Hayslett*, 111 Va. 107 (1910).

³⁵⁸ (9985), C. L. 1897, amended 1905 acts, p. 103; *Wyandotte Rolling Mills Co. v. Robinson*, 34 Mich. 428, 431 (1876).

³⁵⁹ *Hake v. Kent Circuit Judge*, 99 Mich. 216 (1894).

1. That it is a foreign corporation, resident at
in the portion of the state of

2. That service herein was had on a person not intimately connected with the defendant corporation.

3. That by reason of the foregoing, defendant attorney was not able to be notified of the pendency of this suit until the instant and has yet been unable to communicate with the defendant or to learn any of the facts necessary to enable him to make a proper defense for the defendant herein.

4. That so far as defendant said attorney is informed, the defendant has a meritorious defense to the whole of the plaintiff's demand; but that owing to the complicated nature of the same, and the delays attendant upon communication with defendant, at a distant and inaccessible part of the country, said attorney is not sufficiently informed of the same to make a proper defense herein and cannot safely proceed to make such defense without further information.

5. That, by reason of the premises, days is a reasonable time to be allowed defendant within which to form a proper defense, as herein moved.

.....
Defendant's attorney.

880 Several pleas

A defendant may plead specially and separately to each cause of action which has been properly joined in one count.³⁶⁰ A party may plead as many inconsistent pleas or replications as he chooses, but each pleading must be complete and consistent with itself and it must answer the pleading for which it is intended.³⁶¹ Each plea must be complete in itself and form a distinct issue.³⁶² In Illinois, where a party may plead as many pleas as he deems necessary for his defense, each plea stands by itself and forms a distinct issue, and does not operate as an admission of another.³⁶³ The statutory permission to plead simultaneously as many defenses as a defendant deems necessary does not extend to pleas which are inconsistent with one another; as a plea to the jurisdiction of the person and a plea to the merits.³⁶⁴

³⁶⁰ Brady v. Spurek, 27 Ill. 478, 482 (1861); Godfrey v. Buckmaster, 1 Seam. 447, 450 (1838).

³⁶¹ Priest v. Dodsworth, 235 Ill. 613, 619 (1908); West Chicago Street R. Co. v. Morrison, Adams & Allen Co., 160 Ill. 288, 295 (1896); Corbley v. Wilson, 71 Ill. 209, 213 (1874).

³⁶² Priest v. Dodsworth, 235 Ill. 613, 616 (1908).

³⁶³ Farman v. Childs, 66 Ill. 544, 547 (1873).

³⁶⁴ Putnam Lumber Co. v. Ellis-Young Co., 50 Fla. 251, 261 (1905).

881 Additional pleas

After a defendant has availed himself of the right to plead, he cannot plead specially without leave of court. Whenever the defendant has exhausted his right to plead by filing the general issue, and he desires to interpose defenses which are not available thereunder, a court is bound to grant to him leave to plead these defenses if he makes reasonable application therefor.³⁶⁵ An application for leave should be made at the earliest day to avoid the plaintiff's surprise and not to delay the business of the court.³⁶⁶ Leave to file additional pleas should be granted to a defendant when it appears that he is not guilty of culpable negligence in not making application at an earlier date and when the additional pleas are indispensable to the making of a legal defense.³⁶⁷ Upon the allowance and the making of a material amendment to the declaration, a defendant is entitled to plead to it as amended; and if he applies for leave to so plead, the leave should be granted to him.³⁶⁸

882 Abandonment of pleas

A party will be restricted to a single issue if he abandons at the trial all other issues that are raised by the pleas except the one relied upon.³⁶⁹

883 Striking pleas

A plea which is improperly filed may be stricken from the files.³⁷⁰ The mere failure to plead within the time provided by special or general rule, is no ground for striking out a plea which is filed before the defendant is put in default.³⁷¹ A defendant has no right to present the same defense by different pleas. All pleas but one which, in all respects, present the same defense, may be stricken from the files as encumbering the record.³⁷² A plea should not be stricken from the files merely because it is

³⁶⁵ *Bemis v. Homer*, 145 Ill. 567, 571 (1893); *Millikin v. Jones*, 77 Ill. 372, 375 (1875); *People v. McHatton*, 2 Gilm. 731, 734 (1845).

³⁶⁶ *Fisher v. Greene*, 95 Ill. 94, 97 (1880).

³⁶⁷ *Misch v. McAlpine*, 78 Ill. 507, 508 (1875); *Bemis v. Homer*, 145 Ill. 567, 571 (1893).

³⁶⁸ *Griswold v. Shaw*, 79 Ill. 449, 450 (1875).

³⁶⁹ *Franks v. Matson*, 211 Ill. 338, 345 (1904).

³⁷⁰ *Honore v. Home National Bank*, 80 Ill. 489, 492 (1875).

³⁷¹ *Castle v. Judson*, 17 Ill. 381, 384 (1856); *Corbin v. Turrill*, 20 Ill. 517, 518 (1858).

³⁷² *Parks v. Holmes*, 22 Ill. 522 (1859).

defective.³⁷³ On a motion to strike pleas from the files the issue of whether or not a defendant has a valid defense, cannot be raised or tried.³⁷⁴

884 Repleader

After an issue of fact has been actually joined upon a plea presenting a wholly immaterial issue, before verdict, the issue may be stricken from the files, and the court may award a repleader or render judgment by *nil dicit*; after a verdict, a judgment *non obstante veredicto* (notwithstanding the verdict) may be given in a very clear case.³⁷⁵ The judgment may be arrested and a repleader awarded if the finding is not decisive upon the merits. If the finding is decisive, the verdict cures the defect. If no issue of fact is joined upon an immaterial plea, the issue thereby presented can be eliminated only by demurrer.³⁷⁶ An immaterial issue will not be set aside upon the court's own motion.³⁷⁷

COMMENCEMENT AND CONCLUSION

885 Commencement (common law), additional plea

And now come the said defendant, defendant in the above entitled cause, by, his attorney, and by leave of court first had and obtained file the following additional pleas to the said declaration of the said plaintiff, as follows:

886 Commencement, admitting part of claim

And for a further plea in this behalf the defendant says that the several supposed causes of action in the, and counts of the plaintiff's declaration, and each of them, are one and the same cause of action, to wit, the supposed cause of action set forth in said count, and as to that cause of action, the defendant says the plaintiff ought not to have his aforesaid action against him, the defendant, for the sum in excess, to wit, the sum of dollars, parcel of the several sums of money in said counts mentioned, because he says:

³⁷³ Bemis v. Homer, 145 Ill. 572.

³⁷⁴ Bemis v. Homer, *supra*.

³⁷⁵ Consolidated Coal Co. v. Peers, 166 Ill. 361, 365 (1897).

³⁷⁶ Consolidated Coal Co. v. Peers,

supra; Rothschild v. Bruseke, 131 Ill. 265, 271 (1890); Woods v. Hynes, 1 Scam. 103 (1833).

³⁷⁷ Burlingame v. Turner, 1 Scam. 588, 589 (1839).

887 Commencement, entire declaration

And for a further plea in this behalf, the said defendant says that the said plaintiff ought not to have or maintain his aforesaid action against him, the said defendant, because he says that the several supposed causes of action in said declaration mentioned are one and the same, to wit, the supposed cause of action in the (first) count of said declaration mentioned and not other or different causes of action, and as to that cause of action, the defendant says:

888 Commencement, oyer

And for a plea in this behalf the said comes and defends, etc., and craves oyer of the said supposed writings obligatory in the declaration mentioned, and they are read to him, etc., and he also craves oyer of the said conditions of the said supposed writings obligatory, and they are read in these words, etc., and says, *actio non*, because he says:

889 Commencement, several pleas

A first plea is commenced thus:

And the defendant, by, his attorney, comes and defends the wrong and injury, when, etc., and says:

Additional pleas are begun as follows:

And for a further plea in this behalf the said defendant comes and defends the wrong and injury, when, etc., and says; or

And for a further plea in this behalf the said defendant says *actio non* because he says; or

And the said defendant for a further plea in this behalf says that the said plaintiff ought not to have or maintain his aforesaid action thereof against it because it says:

890 Conclusion, nature and effect

The character of a plea, whether it is in bar or in abatement is determined by its conclusion.³⁷⁸ A plea which begins in bar and which ends in abatement is, therefore, in abatement. So a plea which commences in abatement and which concludes in bar, is in bar. Likewise, a plea which begins and ends in abatement is in abatement, although its subject matter is in bar; and a plea which commences and concludes in bar is in bar notwithstanding

³⁷⁸ Pitts Sons' Mfg. Co. v. Commercial National Bank, 121 Ill. 582, 587 (1887).

ing that its subject matter is in abatement.³⁷⁹ The mistake to properly conclude a plea is fatal to it.³⁸⁰

891 Conclusion to the country

And of this the said defendant puts himself upon the country, etc.

892 Conclusion with verification

And this the said defendant is ready to verify. Wherefore he prays judgment if the said plaintiff ought to have or maintain his aforesaid action, etc.

893 Conclusion with verification by record

And this the defendant is ready to verify by the record, when, where and in such manner as the court shall direct, and he prays that the said record be seen and inspected by the court.

894 Conclusion with verification in set-off

And this the said defendant,, ready to verify, wherefore he pray judgment for the balance of said, to wit, the sum of \$., and also whether the said plaintiff ought further to have and maintain his aforesaid action.

895 District of Columbia (statutory commencement and conclusion)

The commencement of a plea is:

1. For a plea to the plaintiff's declaration the defendant says:

There is no conclusion to the country or verification of a plea.

896 Florida

Now comes the defendant, by his attorney, and for a (in case of an amended plea add, amended plea) plea in this behalf says:

1. That (set forth the special matter of defense, and continue with all other defense in the same way).

b

Now comes the defendant in the above styled cause, and for pleas to the plaintiff's declaration filed herein, says:

1. (State matter of defense)

In Florida no conclusion is used. The plea is merely signed by the defendant's attorney.

³⁷⁹ Pitts Sons' Mfg. Co. v. Commercial National Bank, *supra*.

³⁸⁰ Pitts Sons' Mfg. Co. v. Commercial National Bank, *supra*.

897 Maryland

....., the defendant in the above entitled cause by
, his attorney, for plea to each and every count
 of the plaintiff's declaration says:

b

The defendant by, its attorneys for a first plea
 to the declaration in this cause, says (State special matter).
 And for a second plea says:

898 Virginia

The first plea commences with "The defendant says that."
 Second and subsequent pleas may omit the statement that they
 are pleaded by leave of court, or according to the form of the
 statute.³⁸¹

VERIFICATION

899 District of Columbia

District of Columbia, ss.:

I,, being first duly sworn, on oath depose and
 say that I am the for named as
 defendant in the above entitled cause; that I have read over the
 foregoing pleas numbered from to
 inclusive, to which this affidavit is attached; and that the matters
 and facts therein set forth are true to the best of my knowledge
 and belief; and this I am ready to verify.

.....

Subscribed, etc.

.....
 Attorney for defendant.

900 Florida

Before me personally appeared, who being first
 duly sworn, says that he is the duly authorized agent for the
 defendant in this cause, and that the above and foregoing plea
 is true.

Subscribed, etc.

b

Before me on this day personally came and who
 being by me first duly sworn, says that he has read the fore-

³⁸¹ Secs. 3269, 3270, Va. Ann.
 Code 1904.

going pleas numbered, and that the same are true and correct.

.....
Defendant.

Subscribed, etc.

AFFIDAVIT OF MERITS

901 Object

The purpose of an affidavit of merits is to inform and satisfy the court of the existence of a bona fide defense according to the facts that are admissible under the plea, and to thereby avoid frivolous pleading.³⁸²

902 Nature and effect

An affidavit which denies the execution of a promissory note that, under the pleadings, may or may not constitute the basis of a recovery or a defense, is not an affidavit of merits within the meaning of Illinois statute.³⁸³ An affidavit of merits, if filed with a plea of the general issue, is a part of the plea and a part of the record.³⁸⁴ If, however, the plea is stricken from the files on motion, a bill of exceptions is necessary to make the entire proceeding on the motion a part of the record.³⁸⁵ An affidavit of merits in the nature of a plea of set off is regarded with the same strictness in matters of substance as a pleading.³⁸⁶

903 Necessity of affidavit

Swearing to the pleadings is required by statute as a condition precedent to the right to file them.³⁸⁷ A defendant has no right to plead without an affidavit of merits where the plaintiff has a right to and does file an affidavit of his claim.³⁸⁸ The making of a motion at the same time that a plea to the merits is filed, does not dispense with the necessity of filing an affidavit of merits with the plea.³⁸⁹ The affidavit of merits filed with the general

³⁸² *Castle v. Judson*, 17 Ill. 381, 385 (1856); *Chicago, Danville & Vincennes R. Co. v. Bank*, 82 Ill. 493, 496 (1876).

³⁸³ *Chicago, Danville & Vincennes R. Co. v. Bank*, 82 Ill. 496, 497.

³⁸⁴ *Whiting v. Fuller*, 22 Ill. 33 (1859); *Williams v. Reynolds*, 86 Ill. 263, 265 (1877).

³⁸⁵ *Gaynor v. Hibernia Savings Bank*, 166 Ill. 577, 579 (1897).

³⁸⁶ *McCord v. Crooker*, 83 Ill. 556, 561 (1876).

³⁸⁷ *Honore v. Home National Bank*, 80 Ill. 492; Sec. 55, Practice act 1907 (Ill.).

³⁸⁸ *Honore v. Home National Bank*, *supra*; Sec. 55, Practice act 1907 (Ill.).

³⁸⁹ *Kassing v. Griffith*, 86 Ill. 265, 267 (1876); Sec. 55, Practice act 1907 (Ill.).

issue in an action against defendants who are sued jointly may be sworn to by one of the defendants.³⁹⁰ A foreign corporation which is doing business in Illinois is within the statute requiring an affidavit of merits.³⁹¹ This is based upon the construction of the word "resident" in the phrase "if the defendant is a resident of the county in which suit is brought," contained in section 36 of a former act. This phrase has been eliminated from section 55 of the present Practice act. But it is not unlikely that the present section will be construed to include foreign corporations, under the rule that they are amenable to the same rules and regulations as domestic corporations.

904 Additional affidavit

An affidavit of merits which presents a defense only to a portion of the plaintiff's demand, ceases to be operative upon the plaintiff's limitation of his demand to the amount admitted, and the defendant may be required to make an additional affidavit.³⁹²

905 Requisites

It is not necessary that an affidavit of merits should use the exact words of the statute, provided words of equal import are employed and the statute is substantially complied with.³⁹³

906 Forms (Illinois)

....., being first duly sworn says that he is one of the defendants in the above entitled cause and that he verily believes that he has a good defense to this suit upon the merits to the whole of plaintiff's claim.

Subscribed, etc.

DEMAND FOR JURY

907 District of Columbia

To the honorable, the judge of said court:

The defendant,, elects to have this case tried before a jury, and prays the court for leave so to do.

.....
Attorneys for defendant.

³⁹⁰ Whiting v. Fuller, 22 Ill. 33 (1859); Smith v. Batement, 79 Ill. 531, 532 (1875); Sec. 55, Practice act 1907 (Ill.).

³⁹¹ Chicago, Danville & Vincennes R. Co. v. Bank, 82 Ill. 493, 496 (1876); Sec. 36, Practice act 1872, as amended.

³⁹² Haggard v. Smith, 71 Ill. 226, 228 (1874).

³⁹³ Castle v. Judson, 17 Ill. 381, 385 (1856); Sec. 55, Practice act 1907 (Ill.).

To the plaintiff:

Take notice that the defendant, the, elects to have this case tried before a jury.

.....

Attorneys for defendant.

AMENDMENT

908 Requisites

An amendment to a plea must resemble the plea which it purports to amend in the character of the defense proposed.³⁹⁴

³⁹⁴ People v. McHatton, 2 Gilm. 731, 734 (1845).

CHAPTER XVIII

SIMILITER

IN GENERAL

§§

909 Similiter defined

910 Waiver

911 Practice

FORMS

§§

912 District of Columbia

913 Florida

914 Illinois

915 Maryland

IN GENERAL

909 Similiter defined

The word *similiter* is an abbreviation of *et proedictus similiter* and means "and he does the like." It is no part of the pleadings.¹

910 Waiver

A formal joinder of issue is waived in Illinois by proceeding to trial upon the merits without objection.² Proceeding to trial without objection upon a part of the issues joined is a waiver of the issues that are not joined; especially when a party has had full benefit of the unjoined issues.³ In Virginia the mere omission to reply or to join issue is waived by proceeding to trial without a formal joinder in a manner and to the extent as though a formal pleading had been filed.⁴

911 Practice

A court may allow the filing of a joinder in issue at the time the case is called for trial.⁵ Either party, the plaintiff or the defendant, may add the *similiter* to a plea which concludes to the country.⁶

¹ Anderson's Law Dic.

² *Armstrong v. Mock*, 17 Ill. 166 (1855); *Voltz v. Harris*, 40 Ill. 155, 158 (1866); *Hazen & Lundy v. Pier-son & Co.*, 83 Ill. 241, 242 (1876).

³ *Strohm v. Hayes*, 70 Ill. 41, 43 (1873).

⁴ *Deatrick v. State Life Ins. Co.*, 107 Va. 602, 606 (1907).

⁵ *Peterson v. Pusey*, 237 Ill. 204, 206 (1908).

⁶ *Stumps v. Kelley*, 22 Ill. 140, 142 (1859); *Gillespie v. Smith*, 29 Ill. 473, 476 (1863).

FORMS

912 District of Columbia (joinder in sue)

⁷ The plaintiff joins issue on defendant's plea.

.....
Attorney for plaintiff.

Notice of trial

Take notice that the issue joined in this cause will be tried at the next term of this court.

.....
Attorney for plaintiff.

To.....
Attorney for defendant.

Note of issue

.....
Attorney for plaintiff.

.....
Attorney for defendant.

Last pleading was.....
(date)

The clerk will calender this cause to the next term of court.

913 Florida

The plaintiff joins issue upon the plea of the defendant and puts himself upon the country.⁸

914 Illinois

And the plaintiff.., as to the plea of said defendant.., a corporation, etc., by ..h.. firstly above pleaded and whereof ..he.. ha.. putsel.... upon the country, does the like.

.....
Attorney for plaintiff..

915 Maryland

The plaintiff by, his attorneys, for a replication to the pleas of the defendant says:

That he joins issue on the same.

.....
Attorneys for plaintiff.

b

The plaintiffs, by, their attorney, join issue on defendants and pleas.

⁷ See Section 211, Note 60.

⁸ Green v. Sansom, 41 Fla. 94 (1899); Sec. 1055, Rev. Stat.

CHAPTER XIX

REPLICATION

IN GENERAL

- §§
- 916 Replication defined
- 917 Nature and scope
- 918 General replication—*de in-juria*, nature
- 919 Special replication

PRACTICE

- 920 Several replications
- 921 Several replications; leave, motion
- 922 Filing

§§

- 923 Superfluous matter, motion to strike

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- 924 Title
- 925 Traverse
- 926 Sufficiency

COMMENCEMENT AND CONCLUSION

- 927 Florida
- 928 Illinois
- 929 Maryland
- 930 Mississippi

IN GENERAL

916 Replication defined

Replications are general or special. At law, a general replication merely states that the plaintiff joins issue upon the plea. A special replication is one which alleges new matter.¹

917 Nature and scope

In Illinois, upon the filing of a plea, the plaintiff may reply by taking issue or by setting up new matter in avoidance.² The necessity for replying specially to a plea is not removed by section 1055 of the Revised Statutes of Florida. A general replication, under the statute, is sufficient when the plea is the general issue or not guilty, or the matter pleaded amounts to such plea.³ All material facts set out in the plea and not specifically traversed by a replication are admitted and do not require proof to support them.⁴ An unanswered plea is not admitted during the pendency of a demurrer to another plea, until the court has been

¹ Green v. Sansom, 41 Fla. 94, 100 (1899).

² Clemson v. State Bank, 1 Scam. 45 (1832).

³ Green v. Sansom, 41 Fla. 101.

⁴ Hepler v. People, 226 Ill. 275, 278 (1907); Home Ins. Co. v. Favorite, 46 Ill. 263, 267 (1867).

moved to take some specific action upon the plea by a rule to plead or by giving a formal judgment for want of a replication.⁵

918 General replication—*de injuria*; nature, pleading

A replication *de injuria* is a general traverse of the whole plea, permitting the plaintiff to adduce any proof that tends to disprove any of the facts alleged in the plea.⁶ A general replication to a special plea is permissible and puts in issue the material matters thereof.⁷

919 Special replication, pleading

At common law special replications are permissible and necessary whenever a plea sets up a special defense by matter in confession and avoidance.⁸ This rule prevails in Illinois under the statute.⁹

PRACTICE

920 Several replications

The making and the filing of more than one replication to the same plea is permissible under Florida practice.¹⁰ Replications which are, in legal effect, the same as others that are presented in the cause, may be stricken from the files.¹¹

921 Several replications; leave, motion

¹² And now comes the plaintiff by, its attorney, and asks leave of court to reply specially and double to the pleas of the defendants by them pleaded and in the above styled action, to wit, to the plea of and to the plea of license.

922 Filing

A court may permit the filing of a replication at the time a cause is called for trial.¹³

⁵ *People v. Weber*, 92 Ill. 288, 292 (1879).

⁶ *Ayres v. Kelley*, 11 Ill. 17 (1849).

⁷ *National Valley Bank v. Houston*, 66 W. Va. 344, 345 (1909).

⁸ *Gunton v. Hughes*, 181 Ill. 132 (1899).

⁹ Sec. 51, Practice act 1907 (Ill.).

¹⁰ *Hart Fire Ins. Co. v. Redding*, 47 Fla. 228, 247 (1904); Sec. 1059, Rev. Stat. 1892 (Fla.).

¹¹ *People v. Central Union Tel. Co.*, 192 Ill. 307, 309 (1901).

¹² See Section 211, Note 60.

¹³ *Peterson v. Pusey*, 237 Ill. 204, 206 (1908).

923 Superfluous matter, motion to strike

And now comes the defendant,, by, its attorney, and shows to the court here that in the plaintiff's replication the following portions are superfluous: that is to say, the words "and she was also prevented by the fraud, crime and concealment of the defendant from obtaining any knowledge of the said alleged by-law," and moves that the same be stricken out.

And the said defendant further shows to the court that the following words are superfluous, to wit:, and moves the court here to strike out said words.

And the defendant also shows that the following words are superfluous, to wit:, and moves the court here to strike out said words.

.
Defendant's attorney.

REQUISITES

924 Title

It is not necessary to entitle a replication of any term, it being presumed that all pleadings, except pleas in abatement, were filed at the same term.¹⁴

925 Traverse

A replication should not deny matters of inducement in the plea.¹⁵

926 Sufficiency

A bad replication is considered sufficient if interposed to a bad plea.¹⁶

COMMENCEMENT AND CONCLUSION

927 Florida

Now comes the plaintiff in the above entitled cause by his attorney,, and for replication to the defendant's plea, says: 1. That (Set forth matter of replication, numerically under separate paragraphs to all pleas).

All of which the plaintiff is ready to verify.

.
Attorney for plaintiff.

¹⁴ Miller v. Blow, 68 Ill. 304, 309 (1873).

¹⁵ People v. Central Union Tel. Co., 232 Ill. 260, 276 (1908).

¹⁶ People v. Central Union Tel. Co., *supra*.

928 Illinois

And the plaintiffs as to the plea of the defendant by it above pleaded, say that they, the plaintiffs, by reason of anything in that plea alleged, ought not to be barred from having their aforesaid action, because they say:

Portion of indebtedness admitted by plea

And the plaintiff, as to the plea of the defendant by it (secondly or thirdly, etc.) above pleaded, says that he, the plaintiff, by reason of anything in that plea alleged, ought not to be barred from having his aforesaid action, except as to the sum of to wit: \$....., because he says:

Conclusion

And this said plaintiff prays may be inquired of by the country, etc.

b

And this the said plaintiff is ready to verify; wherefore the said plaintiff prays judgment and his damages by him sustained, by reason of the committing of said trespasses to be adjudged to him, etc.

929 Maryland

..... and, plaintiffs, by, their attorney for replication to defendant's plea, say:
(Conclude with attorney's signature).

930 Mississippi

Comes the plaintiff by, his attorney, and by way of replication to plea filed by the defendant in this cause says that he ought to be allowed to recover in this cause, because (Allege particular matter).

And this the plaintiff is ready to verify.

CHAPTER XX

REJOINDER AND SUBSEQUENT PLEADINGS

<p>REJOINDER</p> <p>§§</p> <p>931 Practice</p> <p>932 Requisites</p> <p>933 Commencement and conclusion</p> <p>934 Forms</p> <p>SURREJOINDER</p> <p>935 Commencement and conclusion</p>	<p>§§</p> <p>936 Forms</p> <p>REBUTTER</p> <p>937 Illinois</p> <p>938 Mississippi</p> <p>SURREBUTTER</p> <p>939 Form</p>
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REJOINDER

931 Practice

Special application must be made by the defendant for leave to file several rejoinders.¹ The court's entertaining of a demurrer to a rejoinder which was improperly filed, is equivalent to the granting of leave to file the rejoinder.²

932 Requisites

A rejoinder must be responsive to the allegations of the replication and must fully answer them.³ The rejoinder admits the sufficiency of the replication answered.⁴

933 Commencement and conclusion (Illinois)

⁵And the said defendant, as to the said plaintiff's replication to the said defendant's plea says *actio non*, because he says ⁶ (Conclude to the country or with a verification as in case of pleas).

b

And the defendant, as to the said replication of the plaintiffs to the plea of the defendant, says, that the plaintiffs

¹ Sec. 51, Practice act 1907 (Ill.).

² Ryan v. Vanlandingham, 25 Ill. 128, 131 (1860).

³ Ryan v. Vanlandingham, *supra*.

⁴ Heimberger v. Elliot Frog & Switch Co., 245 Ill. 448, 452 (1910).

⁵ See Section 211, Note 60.

⁶ 3 Chitty's Pl., p. 1232.

ought not, by reason of anything by them in that replication alleged, to have or maintain their aforesaid action against it, the defendant, because it says:

(Mississippi)

Comes the defendant by attorney and for rejoinder to plaintiff's replication to the plea of, says: (Set forth special matter and conclude with verification, or to the country).

b

And for a rejoinder herein to plaintiff's replication, defendant says that the plaintiff ought not to be allowed to recover in this action, because he says: (Set up special matter).

934 Forms (Illinois)

And the said defendant, as to the said plaintiff's replication to the said defendant's (second) plea, whereof the said plaintiff hath put himself upon the country, doth the like.

(Maryland)

Now comes the defendant, by its attorney,, and says:

1. That it joins issue on the replication of the plaintiff to the defendant's plea marked 1, and that it joins issue on the plaintiff's replication to a further plea marked 2 of the defendant's.

.....

Attorney for defendant.

SURREJOINDER

935 Commencement and conclusion (Illinois)

And the plaintiff as to the rejoinder of the defendants to the replication of the plaintiff saith that it by reason of anything in that rejoinder above alleged ought not to be barred from having or maintaining its aforesaid action thereof against the defendants, because he says: (Conclude as in replication).

(Mississippi)

And for a surrejoinder of the plaintiff to defendant's rejoinder to plaintiff's replication herein, the plaintiff says that he ought to be allowed to recover in this action because (Set forth special matter and conclude as in replication).

936 Forms (Illinois)

And the said plaintiff as to the and rejoinders of the said defendant, and which the said defendant hath prayed may be inquired of by the country, doth the like.

.....
Attorney for plaintiff.

̄

And the plaintiff as to the rejoinder of the defendants to the replication of the plaintiff, whereof they put themselves on the country, doth the like.

(Maryland)

And the plaintiff, the said, by, her attorneys, for a surrejoinder to the defendant's rejoinder to the plaintiff's replications to the defendant's plea says that the said plaintiff joins issue thereon.

.....
.....
Attorney for plaintiff.

Service admitted.

REBUTTER**937 Illinois**

And the said defendant, as to the said surrejoinder of the said plaintiff (secondly) above pleaded (or to the said rejoinder of the said defendant to the said replication to the said (second) plea of the said defendant), saith, that the said plaintiff ought not, by reason of anything by him in that surrejoinder alleged, to have or maintain his aforesaid action against him in respect of the said supposed (promise or trespass) in the introductory part of the said (second) plea mentioned, because he saith, that the said defendant did not (state special matter) in manner and form as the said plaintiff hath above in his said surrejoinder in that behalf alleged. And of this the said defendant puts himself upon the country, etc.

938 Mississippi

Now comes the defendant herein and by way of rebutter to the surrejoinder of the defendant herein filed, says that the plaintiff ought not to be allowed to recover in this action by reason of anything alleged in said surrejoinder, and for cause says: (Set up the particular matter and conclude as in plea).

SURREBUTTER**939 Form**

And the said plaintiff, as to the said defendant's rebutter, whereof he hath put himself upon the country, doth the like.⁷

⁷ 3 Chitty's Pl., p. 1236.

PART III
COMMON LAW ACTIONS

CHAPTER XXI

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- 950 Account stated, promise
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- 961 Bailment, action
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- 963 Bill of exchange; acceptance, liability

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- 964 Bill of exchange; declaration, requisites
- 965 Bill of exchange; drawee v. drawer, Narr.
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- 967 Building contract; architect's certificate
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- 972 Checks; drawee v. collecting bank (forged maker and payee), Narr.
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- 975 Commission; insurance adjuster, Narr.
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940 Generally

A declaration in assumpsit must express a consideration, a promise based thereon,¹ and the failure to perform. The declaration has usually six parts or elements: the inducement, the consideration, the promise, the conditions, the breach, and the damages.²

941 Consideration, defect not cured

In actions which are not based upon contracts which import a consideration, as deeds, bills of exchange and promissory notes, the declaration must set out the particular consideration of the undertaking or promise; for, a valuable con-

¹ Read v. Walker, 52 Ill. 333, 334 (1869).

² Chitty's Pl., p. 290.

sideration is of the very essence of the contract. The omission to state the consideration of a contract in a declaration, when that is necessary, is fatal to the maintenance of the action and is not cured by verdict.³

942 Promise, use of word

In *assumpsit*, the declaration should use the word "promise" and not "agree."⁴ It is not necessary, however, to actually use the word "promise" where there is enough alleged in the declaration which shows that a promise took place.⁵ The omission from the common *assumpsit* counts, except in one of them, of a promise to pay, to which the general issue is pleaded, is cured after verdict.⁶

943 Promise; several defendants, doubt as to liability

A plaintiff who is not positive whether he can sustain an action against either of two defendants, should allege in his declaration a several promise against each of the defendants in the alternative, or he should join two counts in the declaration, each count alleging a contract by one of the defendants.⁷

944 Conditions, precedent and subsequent

The averment of conditions precedent is essential in a declaration in which the right of the recovery depends upon their performance.⁸ If a party relies upon an excuse for not performing he must state his excuse, but he must not aver performance.⁹ At common law strict proof of performance is necessary under an allegation of performance of a contract. This rule has been relaxed in actions upon building contracts, where proof of a substantial compliance with a contract is suf-

³ *Minor v. Michie*, Walker, 24, 29 (Miss. 1818); 1, Chitty's Pl., p. 293.

⁴ *Guinnip v. Cater*, 58 Ill. 296, 297 (1871).

⁵ *Union Stopper Co. v. McGara*, 66 W. Va. 403, 409 (1909).

⁶ *Demesmey v. Gravelin*, 56 Ill. 93 (1870).

⁷ *Root & McBride Co. v. Walton*

Salt Assn., 140 Mich. 441, 444 (1905).

⁸ *Phoenix Ins. Co. v. Stocks*, 149 Ill. 319, 325 (1893); *Tillis v. Liverpool & London & Globe Ins. Co.*, 46 Fla. 268, 278 (1903); *Expanded Metal Fireproofing Co. v. Boyce*, 233 Ill. 284, 287 (1908).

⁹ *Hart v. Carsley Mfg. Co.*, 221 Ill. 444, 446 (1906).

ficient.¹⁰ The plaintiff is not bound to set up the performance or the happening of conditions subsequent.¹¹

945 Conditions; waiver or estoppel, proof

A count based upon an express contract need not allege waiver of some of the provisions of the contract, as waiver or estoppel may be proved without pleading it.¹²

946 Breach

The breach which is assigned must be co-extensive with the material part of the undertaking or promise that has been averred.¹³

CAUSES OF ACTION AND SPECIAL DECLARATIONS

947 Acceptance of order, Narr. (Ill.)

¹⁴ For that whereas, one W F, on, to wit,, 19. . . . , in the county aforesaid, made his certain order, and delivered the same to the plaintiff, and thereby then and there requested the defendants to pay dollars (\$.) unto the plaintiff or its order, which said order the defendants on, to wit,, 19. . . . , accepted, and which said order was in words and figures following: (Insert order.)

An which acceptance was thus: namely, plaintiff delivered to said C D by delivery to said D M the said order, and the said D M then and there, on his behalf and on behalf of said C D, orally promised to pay said order, and then and there did pay unto plaintiff the sum of dollars (\$.) thereon, by delivering unto plaintiff said C D's check for that amount, which check was duly cashed, and further then and there promised to pay the balance of said order in a few weeks, and having so promised, retained in his possession, and still retains (so far as plaintiff is informed) the said original order; by means whereof the defendants then and there became liable to pay to the plaintiff the said sum of money, according to the tenor and effect of the said order, and of the said acceptance thereof; and being so liable, the defendants, in consideration thereof, then and there promised the plaintiff to pay to it the said sum of money, according to the tenor and effect of the

¹⁰ Turner v. Osgood Art Colortype Co., 223 Ill. 629, 637 (1906).

¹¹ Carney v. Ionia Transportation Co., 157 Mich. 54, 59 (1909); Tillis v. Liverpool & London & Globe Ins. Co., *supra*.

¹² Evans v. Howell, 211 Ill. 85, 92 (1904).

¹³ Union Stopper Co. v. McGara, 66 W. Va. 409, 410.

¹⁴ See Section 211, Note 60. Precede and follow this and all other declarations by proper commencement and conclusion if not given in form.

said order and of the acceptance thereof aforesaid. Yet though often requested the defendants have failed to pay said order (except said \$.....).

To the damage of the plaintiff for the sum still unpaid on said order, namely, dollars (\$.....) and interest and costs thereon.

948 Account, credits

A check is no settlement of an account, if it is received and cashed in part payment alone, and it need not be returned before commencing suit for the balance.¹⁵ The same rule prevails where a creditor is paid a less amount in full satisfaction of his claim under an agreement which is void on account of fraud, the amount received need not be returned before instituting action for the balance.¹⁶

949 Account, open, Narr. (Miss.)

The defendant is indebted to plaintiff in the sum of dollars due by open account for merchandise sold and delivered by the plaintiff to the defendant at his special instance and request; and also in the sum of dollars for merchandise sold and delivered by plaintiff to defendant at his special instance and request; and in the sum of dollars, being the amount of freight charges paid by plaintiff on some of the goods so sold and delivered to defendant. And being so indebted the defendant undertook and promised to pay plaintiff said sum of dollars and the remainder of the indebtedness on with per cent interest from maturity of said bills respectively. And though often requested so to do, defendant has not paid said sum of money or any part thereof; wherefore, etc.

950 Account stated, promise

A definite verbal promise to pay a sum certain will support an action upon an account stated.¹⁷

951 Account stated, Narr. (Ill.)

For that whereas, the said defendant, on, to wit, the day of, and at the place aforesaid, accounted together with the said plaintiff of and concerning divers sums

¹⁵ Reed v. Engel, 237 Ill. 628, 633 (1909). See accord and satisfaction.

¹⁶ Hefter v. Cahn, 73 Ill. 296, 303 (1874).

¹⁷ Watkins v. Ford, 69 Mich. 357, 362 (1888).

of money, before that time due and owing from the said defendant to the said plaintiff and then and there being in arrear and unpaid, and upon such accounting the said defendant then and there was found to be in arrear and indebted to the said plaintiff in the sum of dollars of lawful money as aforesaid. And being so found in arrear and indebted to the said plaintiff the said defendant, in consideration thereof, afterwards, to wit, on the same day and year, and at the place aforesaid, undertook and then and there faithfully promised the said plaintiff well and truly to pay unto the said plaintiff the sum of money last mentioned, when the said defendant should be thereunto afterwards requested.

.....

952 Account stated and seizure, Narr. (Miss.)

The defendant is indebted to plaintiff in the sum of dollars for goods and merchandise sold and delivered to defendant on day of and for freight charges prepaid on the same; and being so indebted plaintiff and defendant accounted together, when it was found that defendant was indebted to plaintiff in the sum of dollars with interest from; and the defendant then and there promised to pay the same. Therefore, plaintiff asks judgment for said sum with interest and cost of suit.

Plaintiff also asks that a writ of seizure issue for said goods now in the hands of the defendant and that the same be condemned to pay the said indebtedness and interest and cost of suit and that judgment be entered accordingly.

Plaintiff files herewith an account or bill of particulars duly sworn to; he also files an affidavit describing the personal property sold defendant and now in his possession; and it is asked that a writ of seizure issue for the seizure of the property and that it be subjected to the debt due plaintiff with interest and all costs of suit, as the statute provides, that judgment over be rendered in favor of plaintiff for the balance that may be due after subjecting said property.

953 Account stated and seizure, affidavit of amount due (Miss.)

Before me, the undersigned officer, in and for county in the state of, this defendant personally appeared, who being duly sworn, states that he is of the, a corporation organized under the laws of the state of, and that the attached account for dollars with interest at on from against company, of, Mississippi, is just, correct and unpaid and is due from said against whom it is charged.

.....

Sworn, etc.

954 Account stated and seizure, affidavit describing property (Miss.)

Before me, the undersigned officer, in and for county, state of, this defendant personally appeared, being by me first duly sworn, states that he is of the, a corporation organized under the laws of the state of, that according to the best of his knowledge, information and belief of Mississippi, defendant in the above entitled cause against whom suit has been or is about to be brought by the, is indebted to said in the sum of dollars, besides interest, for the purchase money of certain personal property, which personal property, according to affiant's information and belief is now in the possession of said defendant in the of district of county, Mississippi. Said personal property consists of the following, sold, to wit: (Describe property).

Affiant further states that said indebtedness is now past due and that the defendant is liable to pay the same.

Sworn, etc.

955 Account stated and seizure, writ (Miss.)

State of Mississippi.

To the sheriff of county, greeting:

Whereas in the case of v., in the circuit court of district of county, plaintiff has brought suit to recover the sum of dollars with interest thereon at the rate of per cent per annum, as shown in the declaration in said cause, being for the purchase money of certain personal property in possession of said defendant, which purchase money is due and unpaid. Said property is described as follows: (Set forth description of property), being the property sold and delivered by plaintiff to defendant.

You are therefore commanded to deal with said property, as in case of attachment for debt so as to compel said to appear before circuit court of district of county, Mississippi, at the next term thereof to be held at the court house, in the of, on the in, 19...; and we command that you summon said, if he be found in your county, to appear and answer.

Have then and there this writ with your proceedings endorsed thereon.

Witness (by the clerk, etc.)

Return

Executed by taking into my possession (Describe property) of within named found in possession of; the other (Describe property) not found, and executed further by delivering to (date), a true copy of this writ on the same day.

(Signature)

956 Accounting, action

An action of assumpsit is not an appropriate remedy to settle intricate and disputed accounts between parties.¹⁸

957 Alimony, Narr. (Va.)

For this, to wit, that heretofore, to wit, on the day of, 19.., the said plaintiff herein was the plaintiff and the said defendant hereto was defendant in a certain action then pending in the court of, state of, which action was brought to obtain an absolute divorce for the said plaintiff from the said defendant, they being at that time husband and wife, and which said action resulted in the granting by the court, of an absolute divorce, of the said plaintiff from the said defendant; that pending the determination of the said suit, the said plaintiff, by and through her attorneys, and, made and entered into a certain contract in writing with the said defendant who in making the said contract, acted by and through his attorney,, which said contract is in the words and figures following, to wit: (Insert contract).

That after the execution of the said contract, the said defendant acting thereon, and recognizing his liability thereunder, paid to the said plaintiff or her attorneys, the said sum of dollars, in the said contract mentioned, as her attorney's fee, and from the time of the execution of the said contract, also paid to the said plaintiff, said sum of dollars per week, in the said contract specified, up to the week ending, 19.. And the said plaintiff avers that afterwards, to wit, on the day of, 19.., the said plaintiff made and entered into a certain other contract in writing with the defendant, in which last mentioned contract, it was recited that there was then pending between the plaintiff and the defendant certain suits, among which was a suit for divorce in one of the courts of, brought

¹⁸ Leigh v. National Hollow Brake-Beam Co., 223 Ill. 407, 410 (1906).

by (the plaintiff herein) v. (the defendant herein), and among other things in the said contract it was agreed between the plaintiff and the defendant, as follows: (Insert agreement.)

An the said plaintiff says that the suit for divorce referred to in the said last mentioned contract is the same suit for divorce referred to in the first mentioned contract, and by the alimony referred to in the last of the said contracts the said parties meant and intended the said sum of dollars per week, stipulated in the first mentioned of the said contracts, to be paid to the plaintiff as alimony.

Nevertheless, the said defendant, not regarding his said several promises and undertakings in the said contract specified, hath not, nor has any one for him, paid to the said plaintiff, the said sum of dollars per week from and since the week ending, 19.., to the day of, 19.., or any part thereof, although often requested so to do, but the same to pay hath hitherto wholly neglected and refused and still doth neglect and refuse, to the damage of the said plaintiff, dollars.

And therefore she brings her suit.

.....p. q.

958 Assignment of claim for use and occupation, Narr. (Md.)

And for that the said defendant was indebted to for defendant's use and occupation of certain messuages, lands and tenements of said, situate on avenue, between and, in, county, state of Maryland, with said permission; which claim against the said said duly assigned in writing to the plaintiff; and the plaintiff's claims dollars.

959 Assignment of partnership account or note, Narr. (Mich.)

That heretofore, to wit, on day of, to wit, at the of, in said county of, said defendant was indebted to the firm offor goods, wares and merchandise heretofore sold and delivered by said firm to said defendant in the sum of dollars, which said indebtedness appeared in an open account on the books of account of said firm against said defendant; that afterwards, to wit, on or about the day of, 19.., the said firm assigned ¹⁹ to said plaintiff all and singular the said indebtedness account

¹⁹ An averment of assignment or transfer of an account or note by a partnership to the plaintiff need not specify the individual members com-

prising the assignor. Wyckoff, Seamans & Benedict v. Bishop, 98 Mich. 352, 354 (1894).

and demands against said defendant; wherefore the said plaintiff avers that the said defendant heretofore, to wit, on the day of, 19.., at the, of, in the said county of was indebted to the plaintiff as assignee aforesaid in the sum of dollars for the price and value of goods then and there sold and delivered by the plaintiff as assignee aforesaid to the defendant at his request. (Add common counts)

And thereupon the said defendant afterwards, on the day and year aforesaid, in consideration of the premises respectively, then and there promised the plaintiff as assignee aforesaid to pay it, the said several sums of money respectively on request; yet said defendant has disregarded the said promises and has not (although often requested so to do) paid any of the sums of money, or any part thereof; to the plaintiff's damage as assignee aforesaid of dollars, and therefore it brings suit, etc.

960 Automobile insurance, Narr. (Md.)

(Precede this by common counts) And for that on the day of, in the year 19.., the said defendant, body corporate, by its policy of insurance No., in consideration of the sum of dollars premium paid to said body corporate, did insure and cause, the above named plaintiff, to be insured, at and from the day of, 19.., at noon, until the day of, 19.., at noon, to the amount of dollars, upon the automobile belonging to the plaintiff, No., and its equipment and outfit on board, the make of said automobile being "....." (touring), wherever they may be in the United States and Canada, against the risks of fire, explosion, self-ignition, lightning, and against sundry other risks in said policy mentioned.

That on or about the day of, in the year 19.., the aforesaid (touring) automobile, No., and its equipment and outfit on board belonging to said plaintiff were totally destroyed by fire, while said automobile was being used in the United States; and that said plaintiff has fully and completely performed all of the terms and conditions of said policy of insurance issued by said defendant to said plaintiff on his part to be performed, and prior to the destruction by fire of said automobile, as aforesaid, had paid to said body corporate, its agents and servants, the agreed upon premium of dollars, in consideration of which the aforesaid policy of insurance was issued by said defendant to said plaintiff.

That by reason of the fire aforesaid, the aforesaid automobile and its equipment and outfit on board were totally destroyed and completely lost to said plaintiff, and said plaintiff notified

said defendant of said fire and said complete loss, and made demand upon said defendant for the amount due by said defendant to said plaintiff, to wit, the sum of dollars; and said plaintiff has otherwise fully and completely complied with all the requirements of his contract of insurance with said defendant on his part to be performed, but that said defendant has failed and refused to pay said plaintiff the aforesaid amount of fifteen hundred dollars, and continues to fail and refuse to pay the same.

And the plaintiff claims dollars.

Affidavit of claim

STATE OF MARYLAND,

City of, *Sct*:

I hereby certify, that on this day of, 19...., before me, the subscriber, a notary public, by letters patent under the great seal of the state of Maryland, commissioned and duly qualified, residing in the city and state aforesaid, personally appeared, the duly authorized agent of, the within named plaintiff, and made oath in due form of law that there is justly due and owing by insurance company,, of, the defendant in the within case to the plaintiff on the annexed policy of insurance, the cause of action in said cause, the sum of \$...... with interest from the day of, 19.., to the best of his knowledge and belief; and he further swears that the plaintiff is absent from the state of Maryland, and that he is the agent of the said plaintiff, and duly authorized to make this affidavit, and has personal knowledge of the matters therein stated.

As witness my hand and notarial seal.

.....
Notary Public.

961 Bailment, action

Assumpsit is maintainable for the value of property which has been taken under a contract of bailment and converted, the value of the property at the time of the making of a demand for it being the measure of damages.²⁰

962 Bank deposit, Narr. (Md.)

(Precede this by common counts) And for that the plaintiff on or about the day of, 19...., deposited, subject to her order, with the said defendant, then

²⁰ Cushman v. Hayes, 46 Ill. 145, 156 (1867).

and ever since carrying on a duly authorized banking business in county, in the state of Maryland, the sum of dollars; that the plaintiff on or about the day of, 19.., demanded from the said defendant, the said sum of dollars, which said sum or any part thereof, the said defendant refused and ever since has refused and now refuses to pay to the plaintiff.

And the plaintiff claims dollars.

.....

Attorney for plaintiff.

963 Bill of exchange; exceptor, liability

The acceptor of a bill of exchange becomes primarily liable for its payment and is considered the principal debtor, regardless of whether the acceptance is for the accommodation of the drawer or whether the acceptor has funds of the drawer in his hands to pay it.²¹

964 Bill of exchange; declaration, requisites

In a declaration upon a bill of exchange or check, it is not necessary to state the names of the parties to the instrument, unless they are plaintiffs or defendants. So that the allegation that "a certain person" made the check or bill is sufficient in an action brought by the holder of the check.²²

965 Bill of exchange; drawee v. drawer, Narr. (Ill.)

For that whereas, the said defendant heretofore, to wit, on the day of, 19.., at, Illinois, to wit, at the county and state aforesaid, made his certain bill of exchange in writing and directed the same to the said plaintiffs under the name and style of and therein and thereby requested the said plaintiffs to pay to the order of said being then and there a partnership firm composed of the sum of dollars at the sight of said bill of exchange; which said bill of exchange afterwards, to wit, on the day and year aforesaid at, to wit, the place aforesaid, said and, partners as aforesaid under the name and style of, by writing on the back thereof endorsed and directed to be paid to the order of; and the said plaintiffs afterwards, to wit, on the day and year aforesaid, at, to wit, the place aforesaid, paid to the said, he being then and there

²¹ *Huston v. Newgass*, 234 Ill. 285, 291 (1908).

Western National Bank, 152 Ill. 296, 305 (1894).

²² *First National Bank v. North-*

the endorsee and holder of said bill of a exchange, the said sum of dollars, as the said defendant on his said bill of exchange had thereunto directed them, the said plaintiffs; and in consideration of which payment made as aforesaid, defendant, on, to wit, the day and year aforesaid, at, towit, the place aforesaid, became liable to pay to said plaintiffs the said sum of dollars, when requested so to do, and being so liable, in consideration thereof, the said defendant then and there undertook and promised to them, the said plaintiffs, to pay to them, the said plaintiffs, the said sum of dollars when thereunto afterwards requested.

Yet, etc.

966 Bill of exchange; indorsee v. acceptor, Narr. (D. C.)

For that heretofore, to wit, on the day of, at made its certain several bills of exchange in writing, each bearing date the day and year aforesaid, and thereby then and there requested the defendants trading as in and months respectively from date to pay to the order of the said at for value received the sum of upon each of said several bills of exchange; that afterwards, to wit, on the day and year aforesaid, the said several bills of exchange were duly presented to the said firm of, for acceptance, and the said firm, by the name of upon sight thereof, accepted the same in writing, and affixed thereto the genuine signature of the said firm; that the said before the maturity of any of said bills of exchange and before the payment of said sums of money therein specified, or any part thereof, for value, and in the usual course of business, endorsed each of said instruments and delivered the same to the plaintiff; that at the respective dates of their maturity, the said bills of exchange were duly presented for payment, and the plaintiff then and there demanded payment of the respective sums of money therein named; but neither of the defendants, nor any other person, did or would, at that, or at any other time, pay the said sums of money or any part thereof, but so to do hath wholly neglected and refused; by means whereof the defendants became liable to pay to the plaintiff the said sums of money when they should be thereunto requested, and being so liable, the defendants afterward, to wit, on the day of, at the District of Columbia, promised to pay to the plaintiff the said sums of money on request; they have wholly disregarded their promise and have not paid to the plaintiff the said sums of money or any part thereof. Wherefore, etc.

967 Building contract; architect's certificate

The certificate of an architect as to the amount due under a building contract is a condition precedent to the right to demand payment, and can only be attacked for fraud or mistake.²³ An architect's certificate which is required to be issued under a building contract must be considered and taken as a whole, rejecting none of its parts.²⁴

968 Building contract; apartment, Narr. (Ill.)

For that whereas, the said plaintiff heretofore entered into certain articles of agreement in writing, made and concluded on the day of, 19.., by and between said plaintiff and said defendant, wherein and whereby the said plaintiff agreed with said defendant to furnish the labor and material for the excavation and mason work of a certain story apartment house, to be erected on the corner of avenue and street, in the city of, county and state aforesaid; and under which said agreement the said plaintiff did do the work and labor and did furnish the material according to the terms of said contract in all and every respect as therein provided, as by said contract ready to be produced was provided that all questions of damages, allowances for in court will more fully appear; and in which said contract it extra work or work left out, payments upon said contract, and all questions as to the true intent and meaning of said contract shall be referred to as arbitrator, whose decisions should be final and binding, upon both parties; yet, notwithstanding said contract, as aforesaid, the defendant acting under the direction, instruction and advice of said architect, who wrongfully, fraudulently and unjustly acted as the agent and attorney for said defendant and wholly failed to act as an arbitrator under said contract, and said defendant conspiring with said architect to defraud said plaintiff by deducting large sums of money for delays alleged to have been caused by said plaintiff, and upon other false and pretended charges, deducted large sums of money from the amount due said plaintiff, has neglected and refused, and still does neglect and refuse, to carry out and fulfill his part of said contract by him to be kept and performed, or any part thereof, or to pay the plaintiff the sums of money still due him thereunder, to the great damage of said plaintiff in the sum of dollars; and therefore he brings his suit, etc.

²³ Weld v. First National Bank, 255 Ill. 43, 48 (1912).

²⁴ Weld v. First National Bank, 255 Ill. 47.

969 Building contract; building, Narr. (Va.)

For this, to wit, that heretofore, to wit, on the day of, nineteen hundred and, the said plaintiff at, Virginia, at the special instance and request of said defendant, did by a written contract retain and employ the said defendant (he the said defendant then and there being a contractor for the erection of buildings) in the way of his said business of a contractor, to erect a certain two-story building at the corner of and streets, in the city of, Virginia, and to make and lay a floor in said building, as will more fully appear from said written contract, which, is in words and forms, as follows, to wit: (Insert contract.)

And in consideration thereof, and also in consideration of a certain reasonable reward to the said defendant in that behalf, to wit, dollars (\$.....), paid by the said plaintiff to said defendant, he the said defendant then and there, to wit, on the day and year aforesaid, at, Virginia, aforesaid, undertook, and then and there faithfully promised the said plaintiff to erect said two-story building and to make and lay therein said floor in a workmanlike and skilful manner, and that the workmanship should be first-class in every respect and satisfactory to the said plaintiff. And the said defendant knew the purposes for which the said building was to be erected and the uses to which the said floor would be put, to wit, the manufacture of And the said plaintiff has performed all parts of said contract by him to be performed.

But, the said defendant not regarding his said promises and undertakings, unskilfully, carelessly, negligently and improperly made and laid out the granolithic floor in said building and improperly used such improper materials in making said granolithic floor and improperly mixed the ingredients for making and laying said granolithic floor, and improperly constructed the lower stratum or concrete foundation of said granolithic floor upon which the upper stratum was laid, and improperly constructed the upper stratum or wearing surface of said granolithic floor, and improperly failed to water the lower stratum or wearing surface, and improperly failed to care for said granolithic floor after it had been laid and to do whatever was necessary to make said floor harden; and unskilfully, carelessly, negligently and improperly attempted to patch, remake and relay said granolithic floor, that through the mere unskilfulness, carelessness, negligence and improper conduct of the said defendant in this behalf, it became and was necessary for the said plaintiff to cause a new floor to be laid and also thereby, he, the said plaintiff, was forced and obliged to and did necessarily lay out and expend a large sum of money in and about the making and laying of a new floor, to the great

damage of the said plaintiff. And although often requested so to do, the said defendant hath not as yet paid to the said plaintiff the said sum of money, or any part thereof, but to pay the same hath hitherto wholly neglected and refused, and still doth neglect and refuse, to the damage of said plaintiff of dollars. And therefore he brings his suit.

970 Building contract; church, Narr. (Md.)

For that the said plaintiff and defendants, on the day of, in the year nineteen hundred and, entered into a written agreement, signed and sealed by the said plaintiff and the said defendants, under which the said plaintiff bound himself to erect for the said defendants in county a certain church building, to be known as, exclusive of all masonry work, which said masonry work the defendants were bound to provide to be done in a proper and suitable manner before the said plaintiff could execute his part of the said agreement; and that the said defendants failed to perform their part of said agreement, in that they did not erect suitable or proper masonry work, as in the said agreement they were bound to do; and by reason of said failure by said defendants to perform their part of said agreement, as aforesaid, the plaintiff in the erection and completion of the said church under said agreement suffered great loss and damage.

And the plaintiff claims therefor dollars.

971 Building contract; factory, Narr. (Md.)

(Precede this by common counts) And for that the plaintiffs contracted with the defendants on, 19.., and on, 19.., to build a factory building and to extend the same in accordance with the terms of said contracts annexed hereto and hereby made a part hereof, and by the second of said contracts, the plaintiffs agreed to put in certain floors at the prices therein stipulated, upon an election to be made by the defendants, and the defendants later verbally elected to have a cement floor throughout the new factory building as well as the factory building in the first contract above referred to, and in accordance with the terms of said contracts, the plaintiffs prepared and furnished all materials and erected a one-story building at the northwest corner of streets,, Maryland, and the said materials were furnished and the said work was done in accordance with the drawings and specifications submitted by the builders after due notice to commence said work was given to the plaintiffs by the defendants; and all other things required by said contracts to be done by the plaintiffs were done and performed by them; and the said plaintiffs further extended

the building on said property so as to cover the defendants' entire lot on street, and the plaintiffs further placed cement floorings through the entire building referred to in said contracts; and by reason thereof, the defendants promised and became obligated to pay to said plaintiffs the sum of dollars (\$.....) but the defendants have not paid the same nor any one for them, except so far as is shown by the account annexed to the affidavit in this suit, which is made a part hereof.

And the plaintiffs claim dollars (\$.....) damages.

972 Checks; drawee v. collecting bank (forged maker and payee), Narr. (Ill.)

²⁵ For that whereas, heretofore, to wit, in the year of our Lord, at, to wit, at said county, a certain person made and drew, by and under the style, description and addition of a certain draft or order in writing for the payment of money, commonly called a check on a bank, the said check being then and there entitled with the heading or title and being then and there numbered with the number and bearing date of a certain day and year therein mentioned, to wit, the day and year last aforesaid, and then and there caused said check to be countersigned by and under the style, description and addition of and then and there directed the said check to the said plaintiff by the name, style and description of and thereby then and there requested the said plaintiff by the name, style and description last aforesaid, to pay to the order of one describing him in the said check, by the style, description and addition of; ²⁶ and after the aforesaid making of the said check, to wit, on the day and year last mentioned, to wit, at said county of, some person or persons to the plaintiff unknown, wickedly contriving to defraud, etc., without the authority, consent or ratification at any time of him the said and without the knowledge of the said plaintiff, falsely simulated and forged on the said check in the words and figures following, to wit, the endorsement and order of the said to whose order the said sum of money was in and by said check ordered to be paid, and then and there caused the said check so bearing said forged endorsement and order to be placed in the hands of certain persons trading under the style and firm name of who,

²⁵ See Section 987.

²⁶ If check was accepted, insert: which said check the said plaintiff, afterwards, to wit, on the day of, in the year of our Lord last aforesaid, to wit, at said

..... county, upon sight thereof, accepted in writing on the face thereof in the words and figures following, to wit, (give form of acceptance).

afterwards, to wit, on the day and year last aforesaid, to wit, at said county, to give credit and currency to the said forged endorsement and order, further endorsed said check under said forged endorsement and order, in the words and figures following: (Give form of endorsement) and then and there delivered the said check, so endorsed, to the said defendant; and the said defendant, afterwards, to wit, on the day of in the year of our Lord last aforesaid, to wit, at said county, seeking and requesting from the said plaintiff the payment to it, the said defendant, upon the said check, of the said sum of money therein required to be paid to the order of the said and to give further currency and credit to the said forged endorsement and order of the said then and there on the said check, and to induce the said plaintiff to make the said requested payment to it, the said defendant, notwithstanding said forged endorsement and order, did then and there, the said plaintiff being still ignorant of said forged endorsement and order, further endorse the said check, after said forged endorsement and order, in the words and figures following, to wit: (Insert copy of clearing house stamp) and then and there, through the said presented the said check, then and there so endorsed with said forged endorsement and order and with the several other endorsements aforesaid, to the said plaintiff for the said payment thereon so as aforesaid sought and requested by the said defendant.

And the plaintiff avers that thereby, and because of the said several premises, and under and by virtue of the law of the land, to wit, the law of merchant, and by the intendment and implication of such law upon the facts aforesaid, the said defendant, in consideration thereof and that the said plaintiff would make to the said defendant on the said check the said payment so as aforesaid sought and requested, did, when the said check was so as aforesaid by it, the said defendant, presented to the said plaintiff for the said payment, to wit, on the day and year last aforesaid, to wit, at said county, vouch for and warrant to the said plaintiff that the said forged endorsement and order of the said then and there on the said check was the true and genuine endorsement and order of the said; and the said plaintiff, confiding in the said warranty of the said defendant and in consideration thereof, did when the said check was so as aforesaid presented to it, by the said defendant, for such payment, to wit, on the day and year last aforesaid, to wit, at said county, being still ignorant of the said forged endorsement and order, thereupon make the said requested payment to the said defendant upon the said check of the said sum of money thereby

required to be paid to the order of the said
 upon receiving which payment the said defendant then and there delivered to the said plaintiff the said check then and there so endorsed with said forged endorsement and order and with the several other endorsements aforesaid.

And the said plaintiff having afterwards, to wit, on the in the year of our Lord last said. And the said plaintiff having afterwards, to wit, on the aforesaid, to wit, at said county, discovered the fact of said forged endorsement and order, then and there notified the said defendant thereof; and further confiding in the aforesaid warranty of the said defendant, then and there tendered to the said defendant the said check, so endorsed with said forged endorsement and order and with the several other endorsements aforesaid, and then and there demanded of the said defendant that it, the said defendant, should make good its said warranty, and in that behalf should pay back to the said plaintiff the said sum of money so as aforesaid by the said plaintiff paid to the said defendant.

By means whereof, and because of said several premises, the said defendant then and there became liable to pay to the said plaintiff the said sum of money last mentioned when the said defendant should be thereunto afterwards requested; and being so liable the said defendant, in consideration thereof, afterwards, to wit, on the day and year last aforesaid, to wit, at said county, undertook, and then and there faithfully promised the said plaintiff to pay to it the said last mentioned sum of money when the said defendant should be thereunto afterwards requested. (Add common *indebitatus assumpsit*)

973 Checks; indorsee v. drawee, Narr. (Ill.)

For that whereas C K heretofore, to wit, on the day of, 19.., at, to wit, at the county of aforesaid, according to the usage and practice of merchants, made their certain order in writing for the payment of money, commonly called a bank check, bearing date a certain day and year therein mentioned, to wit, the day and year aforesaid, and then and there directed the said order in writing or bank check to the said defendant by the name, style and description of C D, and thereby then and there requested and required of the said defendant to pay to the order of M R the sum of dollars (\$.....); and then and there delivered the said order in writing or bank check to the said M R.

And the said M R, to whom or to whose order the payment of said sum of money in the said bank check specified was to be made as aforesaid, afterwards and before the payment of said sum of money mentioned in said bank check or any part

thereof, to wit, on the day and year last aforesaid, and at the place aforesaid, endorsed the said order in writing or bank check, and by such endorsement ordered and appointed the said sum of money in the said bank check specified to be paid to the plaintiff or order, and then and there delivered the said order in writing or bank check so endorsed as aforesaid to the said plaintiff; of which said endorsement so made thereon as aforesaid, the said defendant afterwards, to wit, on the same day and year, and at the place aforesaid, had notice.

By reason whereof, and by force of the statute in such cases made and provided, the said defendant became liable to pay to the said plaintiff the said sum of money in the said bank check specified, according to the tenor and effect thereof, and of the said endorsement so made thereon as aforesaid in case the said defendant at the time of the presentation for payment of said bank check had on deposit or in its possession subject to the order of said C K sufficient money or funds and property to pay the whole amount of said bank check according to the tenor and effect of said bank check and the endorsement thereon.

And the said plaintiff avers that after the making of said order in writing or bank check, and before the payment of the said sum of money therein specified, to wit, on the day and hour aforesaid, the said order in writing or bank check was presented and shown to the said defendant for payment thereof according to the said usage and practice, and the said defendant was then and there requested to pay the said sum of money therein specified according to the tenor and effect thereof, and the said endorsements thereon; the said defendant then and there having on deposit or in its possession subject to the order of said C K sufficient money or funds and property to pay the whole amount of said bank check, according to the tenor and effect thereof, and of said endorsements thereon; but the said defendant did not, nor would, at the time when the said order in writing or bank check was so shown and presented to it for payment thereof as aforesaid, or at any time afterwards, pay the said sum of money therein specified, or any part thereof, and then and there wholly neglected and refused so to do; whereof the said defendant afterwards, to wit, on the day and year aforesaid, at, in the said county, had notice.

By means whereof the said defendant then and there became liable to pay to the said plaintiff the said sum of money in the said bank check specified, when the said defendant should be thereunto afterwards requested, and being so liable the said defendant in consideration thereof, to wit, on the day and year aforesaid, at the county of aforesaid, undertook and then and there faithfully promised to the said plaintiff to pay it the said sum of money in the said bank check specified,

when it, said defendant, should be thereunto afterwards requested. Nevertheless, etc.

974 Checks; indorsee v. maker, Narr. (Ill.)

For that whereas, the defendant.., on the day of,, in the county aforesaid, made ..h.. order in writing, commonly called a check, on C, bankers, and directed the same to said C, bankers, and required the said C, bankers, to pay to the order of D, the sum of dollars, and then and there delivered the said order or check to said D; and the said D, to whose order the payment of the said sum of money in the said order or check specified was to be made as aforesaid, afterwards, and before the payment of the said money mentioned in the said order, or any part thereof, to wit, on the same day and year and at the place aforesaid, indorsed the said order or check in writing, by cashier, and then and there delivered the said order to the plaintiff..; and the plaintiff.. aver.. that on the day aforesaid the said order was there presented to the said C, bankers, for payment thereof, and they were then and there requested to pay the said sum of money, according to the tenor and effect of the said order; but that the said C, bankers, did not, nor would then nor at any other time, pay the said sum of money or any part thereof, but refused so to do; whereof the defendant.. then and there had notice. By means whereof the defendant.. then and there became liable to pay to the plaintiff.., on request, the said sum of dollars; and being so liable, the defendant.., in consideration thereof, then and there promised the plaintiff.. to pay it the said sum of money. (Add common counts)

975 Commission; insurance adjuster, Narr. (Miss.)

The, the defendant, is a corporation duly and legally organized and doing business at the , Mississippi, in the district of county, and that said defendant was before and on the day of 19.., engaged in the manufacture of cotton seed oil and other by-products from cotton seed, and for that purpose had established in , Mississippi, a plant commonly known as a cotton seed oil mill, and had in the warehouse of said plant accumulated a large stock of cotton seed which was on hand on the day of 19.., and had procured and did have on said date a large amount of fire insurance in sundry and various companies amounting in the aggregate to dollars on the plant and about dollars on the products stored therein; and on said date a fire broke out in said warehouse and destroyed the same and the products

therein, inflicting a loss upon said defendant on which the insurance companies were obliged to pay for on the plant the sum of dollars and on the products stored therein dollars.

Said losses were distributed as stated among a large number of fire insurance companies, some of which were authorized to do business in the state of Mississippi and many of which were not authorized to do business in the state of Mississippi; and as to the companies which were not authorized to do business in this state it was impossible for said companies, without a violation of the criminal laws of the state, to have the loss ascertained and adjusted, either by their special agents, or independent adjusters for that purpose; and it was impossible and impractical for the defendant to collect its loss without making such proof.

Plaintiff is an authorized insurance adjuster in the state of Mississippi and was employed by the said insurance companies who were authorized to do business in this state, and who sustained losses on said plants and products, to adjust said loss for them, which plaintiff did.

Subsequent to this action on the part of plaintiff for said authorized companies, the defendant, realizing that it must have proofs of loss showing in detail the losses sustained by it in said fires by which the said companies that were not authorized to do business in this state, negotiated with plaintiff and procured his services to make for it proofs of loss against said non-authorized companies, and with that end in view the defendant forwarded to plaintiff a telegram as follows: (Set forth telegram) by which telegram the said defendant employed plaintiff, who was a regularly authorized insurance adjuster in the state of Mississippi, to do said work for it and became liable and bound to pay a reasonable compensation for said services; whereupon in obedience to said request, plaintiff made up the proofs of loss for said against the said companies that were not authorized to do business in the state of Mississippi and forwarded the same to the, which proofs of loss were comprehensive and in every particular sufficient for the purpose for which they were made, and by reason of which the, the defendant, was enabled to procure and did procure with the said insurance companies a settlement and adjustment of the losses on the figures thus furnished by plaintiff at defendant's request.

By reason of which request and the services rendered the defendant became liable to plaintiff and then and there promised to pay plaintiff a reasonable compensation and the usual charges for said services. The defendant knew that plaintiff was an insurance adjuster and that they would have to pay for his services what they were reasonably worth and what it was customary to charge when they made said request and accepted

said services, and defendant thereby became bound to pay the plaintiff a reasonable price for said services; and the customary charge which the defendant promised to pay was the sum of dollars, being per cent of the amount involved as shown by the itemized bill of particulars filed with this declaration and marked exhibit "A," which bill of particulars, exhibit "A," is asked to be taken, considered and made a part of this declaration the same as if copied herein in words and figures. Plaintiff avers and charges that the said sum of dollars as shown by said bill of particulars is a reasonable, usual, just and customary charge for said services, and is the lowest per cent charged for similar services by adjusters of insurance.

Plaintiff avers and charges that said bill for said services was rendered to the defendant for the said sum of dollars, as shown in said itemized bill of particulars after said services had been rendered and the adjustment with said companies had been made when said sum was due and payable to plaintiff; and although said sum is long since past due, and the defendant has been often requested to pay the same, it has wholly failed and refused to pay said sum, or any part thereof, and still refuses to pay the same, to the damage, etc.

976 Commission; real estate broker, loan, Narr. (Ill.)

For that whereas the defendants, heretofore, to wit, on the day of 19.., in the county aforesaid, engaged the said plaintiffs to act for them and on their behalf to procure for them a loan of dollars, to be secured by trust deed on certain real estate situated in county, Illinois, and agreed to pay the plaintiffs a commission of per cent on said amount of dollars for their services as brokers in negotiating said loans, which agreement was in writing and is in the words and figures following, to wit: (Insert application for loan). And the said plaintiffs aver that in pursuance of said agreement they at once entered upon the negotiation of said loan and procured the same from one of their customers, one, for the amount and upon the terms therein stated; that thereupon the said defendants became and were indebted to the said plaintiffs for their services in negotiating said loan, in the sum of dollars, under the terms of said agreement; and being so indebted, the said defendants, in consideration thereof, then and there promised the said and to pay them said sum of money on request. Yet, etc.

977 Commission; real estate broker, sale, authority

Ordinarily, an agent must personally perform his services, unless he is expressly permitted to delegate his authority to

others. An authority to employ a sub-agent cannot be implied in the absence of evidence of a fixed and established custom of the particular trade or business in the place where the agency is to be exercised for the agent to employ sub-agents, and such employment is necessary, proper and usual to the effective exercise of the authority conferred.²⁷ An authority to fix the price of anything does not confer the right to employ a sub-agent.²⁸

978 Commission; real estate broker, sale, Narr. (Fla.)

Plaintiff sues defendant because prior to the institution of this suit, to wit, on the day of 19.., the defendant employed the plaintiff, who is a real estate and timber land broker, to procure a purchaser for the pine timber lands owned by the defendant, lying in county, in the state of Florida, represented by the said defendant to be about acres, together with mills, plants and railroads located thereon.

That the plaintiff in pursuance of his employment as such broker did procure and introduce to the said defendant, and that the said defendant subsequently sold all of said lands to the said

And the plaintiff avers that the sale to the said was made through the efforts of the plaintiff in interesting the said in said property; that the plaintiff's acts in this connection were the procuring cause of the sale of the said property for the sum of dollars; and the plaintiff avers that by reason of the premises the plaintiff became entitled to receive from the defendant a commission of per cent of said amount. Wherefore, etc.

(Illinois)

For that whereas, on, to wit, the day of 19.., the defendant was the owner of the following described premises, to wit: (Insert legal description), together with the improvements thereon, situated in the city of, county and state aforesaid, and being such owner, did, on, to wit, the day aforesaid, at, to wit, the county aforesaid, employ the plaintiff to find a purchaser for said premises, within days from the day aforesaid, at the price of, to wit, dollars; and the plaintiff avers that said defendant then and there undertook and promised to pay to the plaintiff in consideration of the procuring by the plaintiff of a purchaser for said premises, at said price, and within said time, the sum of dollars. And the

²⁷ Dogget v. Greene, 254 Ill. 134, 140 (1912).

²⁸ Dogget v. Greene, 254 Ill. 138.

plaintiff avers that he, thereafter, and within said period of days, found and procured a purchaser for said premises at and for the price aforesaid, and to which said purchaser so procured by the plaintiff the defendant sold premises at and for the price aforesaid. By means whereof the said defendant became liable to pay to the plaintiff the said sum of dollars, aforesaid. Nevertheless, etc.

b

For that whereas, heretofore, to wit, on the day of 19.., the plaintiff was, and ever since has been, a real estate broker carrying on his business in the city of, county of and state of Illinois; and the said defendants, on the date last mentioned, claimed to be the owners in fee simple of the premises on the (Give general location) in the city and county aforesaid, and the building thereon, known as the building, and requested the said plaintiff to procure for them a purchaser for said premises at the price of dollars, and then and there promised to pay the plaintiff* so much money as he reasonably deserved to have for his services in procuring such a purchaser, and the plaintiff avers that he then and there reasonably deserved to have therefor the sum of dollars upon the rendition of said services; whereof the said defendants then and there had notice.* (Or, in place of the matter between stars, aver: "at the rate of commission which it was then and there the custom to pay real estate brokers in said city of for services in procuring a purchaser of real estate; which rate plaintiff avers was per cent on the price at which such property was sold or bargained to be sold; and which custom and rate were well known to the said defendants.")

And the plaintiff further avers that thereafter, on the date last aforesaid, the plaintiff did procure a purchaser, ready, willing and able to buy said premises, at the price so fixed, as aforesaid, and the said defendants thereupon entered into a contract with the said purchaser whereby the said defendants agreed with the said purchaser to sell to him, and the said purchaser agreed to buy of the said defendants, the premises above described for the sum of dollars.

By means whereof the said defendants became and were indebted to the said plaintiff in the sum of dollars, for procuring such a purchaser as above set forth; and being so indebted, the said defendants in consideration thereof then and there promised the said plaintiff to pay him the said sum of money on request. Yet, etc.

c

For that whereas heretofore, to wit, on the day of 19.., at the said county of

....., the said defendant by the name and style of
 made and delivered to the plaintiff a certain agree-
 ment in writing in the words and figures following, to wit:
, 19..

Dear Sir—I hereby agree to lease my bldg. at
, known as the, at
 \$..... per month for first year, or the privilege here-
 after of buying if they choose at \$....., or if buildings
 should not be suitable will donatesquare ft., along
 the for company to build on. Will allow
 you as commission for said location one-third interest in
 acres located near said works. (Signature)

And the plaintiff avers that by the word "bldg." in the
 said agreement was meant a certain building and premises of
 the said defendant in said county, to wit, the building and
 premises known as the at
, in said county; and that by the word "company" in
 said agreement was meant a certain manufacturing firm or cor-
 poration known as the, then and there
 composed of certain persons, to wit,
 and, said last named company was then
 engaged or was about to engage in the business
 of the manufacture and sale of in said
 county.

And the plaintiff further avers that under and in pursuance
 of said contract, the plaintiff afterwards, to wit, on the day and
 year last mentioned, to wit, at said county, brought and intro-
 duced to the defendant the said persons composing the
, to wit, said and said
; and through the said efforts and intro-
 duction of the said plaintiff the said
 did enter into, take and accept a lease and demise from the
 plaintiff to them, said and
, of the said building and premises, for a certain
 term, to wit, for the term of years at a certain agreed
 rental, to wit, a rental of dollars per year, and
 did under the said lease and demise enter into occupation of
 said building premises and did locate said
 in and upon said building and premises; and that said
 thereupon, to wit, then and there engaged in and
 carried on, and has since that time thence hitherto carried on
 and is still carrying on, on said premises, the said business of
 the manufacture and sale of; and the said plain-
 tiff avers that said defendant accepted said location of said
 on said premises as and for the location
 in said contract mentioned.

Yet, the plaintiff avers that the defendant did not nor would
 allow the plaintiff one-third interest in acres located
 near said works, but wholly neglected and refused and still

neglects and refuses so to do, to wit, at said county, to the damage of the plaintiff of dollars. By reason whereof the defendant became liable to pay to the plaintiff his said damage, to wit, said sum of dollars, and being liable, the defendant afterwards, to wit, on the day of 19.., to wit, at said county, undertook and promised to pay the plaintiff said sum of money last mentioned when thereunto requested. But although there afterwards often requested, to wit, at said county, the defendant hath neglected and refused and still neglects and refuses to pay the plaintiff said sum of money, or any part thereof, to the damage of the plaintiff of dollars; wherefore he brings suit, etc.

(Michigan)

For that whereas, the said defendant, heretofore, to wit, on or about the day of 19.., was indebted to the said plaintiff in the sum of dollars, for services rendered pursuant to a special agreement, entered into orally by and between the said defendant and the said, deceased, in relation to the sale and transfer of a certain piece of real estate on the corner of avenue and street, in the city of, county, Michigan, of which said defendant had charge and control. And the plaintiff avers that the said, deceased, at the request of the said defendant, had agreed to use his efforts in bringing about a sale of said real estate, and in finding a purchaser for the same, and the said defendant had agreed in consideration of the premises, that he would pay the said, deceased, per cent commission on the purchase price of said real estate, which after some negotiations had been fixed at the sum of dollars, and the said, deceased, had found a purchaser in one, who was willing to buy said property at said price, if he could make suitable arrangements for the purchase price thereof.

And the plaintiff avers that the said, deceased, had entered upon negotiations with the said....., under said contract, and at a certain stage of said negotiations, and before the said had effected a sale, a new agreement was made orally between the said and the said defendant, by which the said defendant undertook and promised to pay to the said his commission at all events, in case any sales should thereafter be effected to the said of the said property, either through the intervention of the said or any other person.

And the plaintiff avers that the said, de-

ceased, continued his efforts in that behalf, and that the said became the ultimate purchaser of the said property, and that the said defendant recognized the fact that the said had done a certain amount of labor in finding a purchaser and bringing about a sale of said property, and thereupon agreed to pay the said the said commission of dollars, in pursuance of said modified agreement.

And the plaintiff avers that in consideration of the premises, the defendant then and there undertook and faithfully promised to pay the said, this plaintiff's intestate, the said sum of dollars, to wit, on or about the said day of,

An the said agreement, in its modified form, being so made as aforesaid, afterwards, to wit, on or about the said day of,, at the city of,, in consideration thereof, the said defendant then and there promised to pay the said plaintiff's intestate, the said sum of money when requested. Yet the said plaintiff says that the said defendant contriving and wrongfully and unjustly intending to injure the said plaintiff's said intestate, did not nor would perform said agreement, promise and undertaking, and thereby craftily and subtly deceived the said plaintiff's intestate, in this, that the said defendant neglected and omitted to pay said sum of money, and the interest thereon, and as plaintiff's said intestate was entitled to receive by virtue of said agreement and the modification thereof, constituting said special agreement and undertaking, according to the tenor and effect, true intent and meaning thereof, that is to say, refused to pay said intestate the said sum of money and the interest thereon, in compliance with his said special agreement and undertaking, so made by the said defendant, as the agreed compensation to the said intestate, for his said services rendered in pursuance of the said agreement and undertaking, so modified as hereinbefore set forth.

And the plaintiff avers that on the day of 19..., the said departed this life at the city of aforesaid, and thereafter such proceedings were had in the probate court for said county of, and on the day of, 19..., was duly appointed and duly qualified as general administrator of the estate of said deceased, and on the day of, 19..., the said resigned the trust imposed upon him by said court, and on said day of, 19..., the said probate court accepted said resignation; and thereupon on the day of, 19... the said was appointed administrator *de bonis non*, and has duly qualified, and is now executing the

trust imposed by said office, and he brings into court here the letters of said probate court, which give sufficient evidence of his authority to act in that behalf. To the damage of the plaintiff in all in the sum of dollars, and therefore he brings suit, etc.

(Mississippi)

That the plaintiffs are engaged in the real estate business in, county, Mississippi; that they negotiate sales of property for other persons, representing either the seller or buyer; that the defendant,, on the day of, 19.., was owner of a certain residence, situated in the city of, street, county, Mississippi, and being desirous of selling the same, contracted with the plaintiffs to procure for him a purchaser for said residence; that the said defendant contracted and agreed to pay the plaintiffs per cent of whatever amount said property should be sold for, which price should be satisfactory to the defendant.

That after accepting said employment the plaintiffs used all due diligence to find a purchaser for the defendant; that they listed said property on their books and spent much time, labor and money in an effort to find a purchaser for said property. That the plaintiffs had amongst their customers and correspondents, one, who desired to buy a residence in of, and the plaintiff with the consent of the defendant took and and showed them this property with the view of making a sale of the same; that said plaintiffs spent much time and labor in an effort to make said sale; that the said defendant did not know the said and did not know that he was a prospective purchaser of said house, and the said did not know of the said defendant's house, but that the trade hereinafter set out and made was the result of plaintiffs' effort; that after the said residence had been shown to and by the plaintiffs and as a result of the plaintiffs' labor and efforts in finding said customer and showing said property and introducing the said defendant, upon the day of, 19.., said trade was consummated, the said defendant taking cash and other property, amounting in all to dollars, the said defendant having duly deeded to said residence, which deed is now on file in the chancery clerk's office in, Mississippi.

Plaintiffs allege and aver that it was solely and only through the efforts of the plaintiffs that the said and the defendant were introduced one to the other, and, as a result thereof said sale was made. Wherefore, the said defend-

ant became and was and is now indebted to the plaintiffs in the sum of dollars, which the defendant refuses and fails to pay, either in whole or in part, although payment has often been demanded of him.

979 Commission; stock broker defined

A broker is one who purchases and sells for others stocks, bonds or other securities on commission, and who has the power, in his own name or that of his principal, to receive, hold or transfer the securities which are the subject matter of the contract, and to pay or receive payment for the securities bought or sold, unless this power is limited by statute or ordinance.²⁹ A person who deals with property which is not in his custody, is not a broker within the meaning of an ordinance of Chicago. Certificates of stocks, bonds and other securities are considered as property under that ordinance.³⁰

980 Contracts, law governing

The construction, the validity and the obligation of a contract is determined by the law of the place where it is made, or it is to be performed. A contract is in law regarded as made at the place where it is delivered. A void contract in one state may be made valid and enforceable by the laws of another state.³¹ The security is merely an incident to the contract and in no way affects its validity.³²

981 Contracts, generally

In an action upon a written contract, the whole agreement and all of the previous conversations relating to the subject matter, are presumed to have been merged in a written contract and form the basis of the action.³³ An action of assumpsit lies upon a contract express or implied.³⁴ Immediately upon the repudiation of an executory contract by one of the parties, the other may bring an action for its breach without

²⁹ Banta v. Chicago, 172 Ill. 204, 213, 217 (1898); Hatley v. Kiser, 253 Ill. 288, 290 (1912).

³⁰ Hatley v. Kiser, *supra*; Sec. 194 City ordinances, Chicago.

³¹ Walker v. Lovitt, 250 Ill. 543, 546, 549 (1911); Sec. 8, c. 74, Rev. Stat. (Ill.).

³² Walker v. Lovitt, 250 Ill. 549.

³³ Grubb v. Milan, 249 Ill. 456, 463 (1911).

³⁴ Chicago Terminal Transfer R. Co. v. Winslow, 216 Ill. 166, 171 (1905).

waiting for the day of performance of the contract therein specified.³⁵

982 Contracts; performance, tender

A person who in good faith and not as a mere matter of speculation, fails to wholly perform an entire express contract may sue in implied assumpsit the person who receives a substantial benefit from the part performance of the contract for its reasonable value, not exceeding the contract price, less the damages, if any, resulting from the non-performance of the entire contract, unless a performance is prevented by the defendant's own fault, when the recovery may exceed the contract price. This cause of action is not a repudiation or a rescission of the special contract, but it is entirely independent thereof. It arises upon equitable grounds from the benefit received from the partial performance of the special contract, and is in derogation of the common law. By that law, whenever there was an entire express contract, none could be implied.³⁶ A contract which calls for successive acts, first by one party and then by the other, is not breached until the non-performance of the precedent act. A contract which contemplates concurrent acts is breached when one of the parties is ready and willing and offers to perform, provided the other will concurrently perform his part, the tender or offer to perform being conditional; or when there is a refusal to perform by one of the parties and the other is ready and willing to perform, in which case no actual offer or tender is necessary to a breach of the contract.³⁷

983 Contracts; third person's benefit, action

A person for whose benefit a promise is made may maintain an action upon it provided the promise is based upon valuable consideration.³⁸

984 Contracts; third person's benefit, declaration, requisites

On a contract made for the benefit of a third person, the declaration must contain an averment of the plaintiff's special beneficial interest in the performance of the contract.³⁹

³⁵ *Chicago Title & Trust Co. v. Sagola Lumber Co.*, 242 Ill. 468, 476 (1909).

³⁶ *Wilson v. Wagar*, 26 Mich. 452, 456, 463 (1873); *Booske v. Gulf Ice Co.*, 24 Fla. 550, 559 (1888).

³⁷ *Osgood v. Skinner*, 211 Ill. 229, 235 (1904).

³⁸ *Merriman v. Schmitt*, 211 Ill. 263, 266 (1904).

³⁹ *Rodhouse v. Chicago & Alton Ry. Co.*, 219 Ill. 596, 602 (1906).

985 De facto corporation, Narr. (Ill.)

For that whereas, heretofore, to wit, on the day of, 19.., at the city of, to wit, at the county aforesaid, and at divers times prior thereto, beginning with, to wit, the day of, 19..., at the city of, to wit, at the county aforesaid, said defendants pretending to be directors and officers of a pretended stock corporation by the name of , did assume to exercise corporate powers and to use the name of said pretended corporation without having theretofore complied with an act of the state of Illinois, entitled, "An act concerning corporations" (being a part of chapter 32 of the Revised Statutes of the state of Illinois), which prescribe and regulate the manner and means in and by which corporations for pecuniary profit may be lawfully organized and authorized to do business, that is to say, said defendants did not file or cause to be filed and there had not been filed prior to or at said time, to wit, the day of , 19.., in the recorder's office of county, in which county was the principal office of said pretended corporation, a certificate from the secretary of state of Illinois of the complete organization of said corporation, and so assuming and pretending, as aforesaid, said defendants did purchase from said plaintiff.. on the alleged behalf of said pretended corporation, divers goods, wares and merchandise, of the value in all of the sum of dollars and cents, which said goods, wares and merchandise, were by the said plaintiff, at the times respectively of said purchases, and at the request of said defendants, delivered to them as and so pretending to be directors, officers and agents of said pretended corporation; * by means of which said defendants became and were jointly and severally liable as partners, doing business under the name of , to pay the plaintiff said purchase price or value of said goods, wares and merchandise, so as aforesaid purchased by them,* (In a second count, in place of the matter between stars, aver: "whereby and by force of the statute in such case made and provided, said defendants became and were jointly and severally liable to pay to the plaintiff.. said purchase price or value of said goods, wares and merchandise, so as aforesaid purchased by them in the name of such pretended corporation"), and being so liable, said defendants in consideration thereof, then and there, to wit, on the day and year aforesaid, at the place aforesaid, promised to pay to the said plaintiff said last mentioned sum whenever they should be thereunto afterwards requested by said plaintiff.⁴⁰ Nevertheless, etc.

⁴⁰ Loverin v. McLaughlin, 161 Ill. 417 (1896).

986 Delinquent tax, drainage

In Michigan the county drain commissioners may maintain an action of assumpsit for the collection of delinquent drain taxes.⁴¹

987 Draft, forged endorsement

The drawee who pays a draft to an endorser who derives title to the draft through a prior forged endorsement, may recover back the money so paid unless the forged endorsement was obtained with the acquiescence of the drawee, on the principle that when one of two innocent parties must suffer loss from the wrongful acts of a third party, the party who has made it possible by his negligence for the third party to commit the wrong, must stand the loss.⁴² A draft which is drawn with an intent to use, and actually using, a fictitious person as payee, is in legal effect, payable to bearer. The fictitious payee's endorsement is not a forged endorsement.⁴³

988 Draft, indorsee v. acceptor, Narr. (Md.)

(Precede by common counts) And for that
 and, co-partners trading as
, heretofore, to wit, on the day of
, in the year 19..., according to the use and practice of merchants, made their certain drafts or orders in writing for the payment of money, each bearing date the day and year aforesaid and payable respectively,
 months after date, each for the sum of dollars and then and there directed the said drafts or orders to the defendant and thereby then and there requested the said defendant to pay to their order, dollars, and delivered the said drafts or orders to the said defendant for acceptance; and the said defendant then and there accepted the same in writing; and after the making of said drafts, and the said acceptances thereof, and before the payment of the said sums of money therein specified, the said, co-partners trading as aforesaid, for value and without notice of any defect therein, before maturity transferred, assigned and delivered the said drafts to the plaintiff, who then and there became and was from thence hitherto hath been and still is the lawful indorsee and holder in due course thereof, and

⁴¹ (4367), C. L. 1897 (Mich.).

⁴² Bartlett v. First National Bank, 247 Ill. 490, 497, 498 (1910).

⁴³ Bartlett v. First National Bank,

247 Ill. 500.

entitled to the payment of the said sums of money therein specified; and the said plaintiff avers, that after the making of the said drafts and after the said transfer, the said drafts were each presented to the said defendant for payment thereof, and the said defendant was then and there requested to pay the same according to the tenor and effect thereof; but that the said defendant did not pay the said drafts, or either of them, or any part thereof; and that the said defendant hath not, at any time, since paid the amounts specified in said drafts, or any part thereof.

And the plaintiff claims dollars.

989 Drainage benefits, liability

One drainage district is liable to another drainage district by way of contribution, for any benefits it derives from the construction or enlargement of a drainage system.⁴⁴

990 Drainage benefits; declaration, requisites

In an action by drainage commissioners for the recovery of a fair amount for benefits arising from drainage, the declaration must aver that the natural water-course or channel that was improved was upon the lands owned by defendants, because the statute authorizes the bringing of such action only against land owners whose lands are intersected by the channel improved.⁴⁵

991 Employment; civil service, new charges

The right of a civil service employee to continue in his action for unpaid salary is not suspended by bringing new charges against him under the Civil Service act after original charges have been quashed on *certiorari* and there has been no attempt to proceed under them.⁴⁶

992 Employment; constructive service, election of remedies

An employee who has been wrongfully discharged and paid to the date of the discharge, may treat the contract of employment as at an end and sue at once for its breach, in which case he can recover only the damages which resulted from the breach from the date of the discharge to the date of the commencement

⁴⁴ Drainage Commissioners v. Union Drainage District, 211 Ill. 328, 332 (1904).

⁴⁵ Vermilion Drainage District v. Shockey, 238 Ill. 237, 239 (1909).

⁴⁶ Bullis v. Chicago, 235 Ill. 472, 479 (1908).

of the suit. Or, he may consider the contract of employment as continuing and sue at any time before or after its expiration; and if the suit is commenced before, but is not tried until the expiration of the contract, he may recover the contract price, less the amount that he has earned or that by reasonable diligence he might have earned in other employment. A recovery in one action is a bar to all future actions upon the contract of employment and any actions that might have grown out of the relation of employer and employee by reason of the wrongful discharge. Contracts of employment which are payable in instalments as the wages fall due do not constitute an exception to this rule, as the doctrine of constructive service or employment is not recognized in Illinois. An action upon one instalment is a bar to an action upon a subsequent instalment of an employment contract.⁴⁷

A contract which expressly stipulates for a fixed period of employment is regarded as indivisible in Maryland, although the wages are to be paid in weekly or monthly instalments, giving a wrongfully discharged employee who has been paid up to the time of discharge but a single remedy for the recovery of the entire damages sustained from the breach, and barring any subsequent action in case of a recovery therefor.⁴⁸

In Mississippi, a contract of employment which requires the payment of compensation in instalments is considered as divisible and will sustain an action for each maturing instalment, the first judgment being no bar to a subsequent action and judgment.⁴⁹

993 Employment; cutter and fitter, Narr. (Ill.)

For that whereas, the said plaintiff, heretofore on, to wit, the day of, 19.., at the city of aforesaid, was by profession and occupation a cutter, fitter and designer of ladies' cloaks and dresses, and of long experience in the said profession and occupation, to wit, years of such experience, during which time ..he had conducted and carried on h.. said profession and occupation under h.. professional name of, and was capable of earning and did earn a large salary in the exercise of h.. said profession and occupation, to wit, a salary of

⁴⁷ Doherty v. Schipper & Block, 250 Ill. 128, 132, 134 (1911).

⁴⁸ Olmstead v. Bach, 78 Md. 132, 151 (1893).

⁴⁹ Williams v. Luckett, 77 Miss. 394, 397 (1899).

..... dollars (\$.....) per week, under contracts by the year; all of which was then and there well known to the defendant.

Plaintiff further says that on, to wit, the said day of, 19.., at the special instance and request of the said defendant, ..he, under the said name of entered into a certain contract with the said defendant in the line of h.. said profession and occupation, by the terms of which the said defendant undertook and promised to employ the said plaintiff, as a cutter, fitter and designer of ladies' cloaks and dresses at the store of the said defendant in the said city of, for one year from, to wit, the day of, 19.., h.. daily hours of service to commence at, to wit, o'clock a. m. as near as might be, and to end, at, to wit, the hour of o'clock p. m., as near as might be, and the plaintiff to have one week of vacation during the said year and all the regular holidays, and all Saturday half holidays during the season in which it is customary to have the same, and to go to New York City for one week, each trip, in the spring and fall on the business of the said defendant connected with h.. said line of employment.

And the plaintiff further says, that the defendant was to pay h.. therefore, the sum of dollars (\$.....) each and every week during the continuance of the said contract through said years and was to pay the same to h.. weekly.

And the plaintiff further avers that relying upon the afore-said promises and undertakings of the said defendant, and in consideration thereof, ..he accepted the said offer and agreed to the terms thereof, and undertook and faithfully promised to carry out the terms and conditions of the said contract, and at once entered upon and continued the execution of the said agreement and faithfully performed each and every of the terms thereof, and especially performed each and every condition precedent to be done and performed by h.., the said plaintiff, and so continued to execute and carry out the conditions of the said contract until the defendant refused further to carry out the terms and conditions thereof by h.. to be kept and performed and refused to permit the plaintiff to execute and carry out the same on h.. part, and wrongfully prevented the plaintiff from fulfilling the terms and conditions thereof to be kept and performed by h..

And the plaintiff further avers that ..he so continued in the execution of the said contract from, to wit, the said day of, 19.., until, to wit, the day of, 19.., and the defendant paid h.. therefor at the rate of dollars (\$.....) per week, from, to wit, the said day of, 19.., up to, to wit, the said day of, 19.., when, without any reasonable

cause or excuse, the said defendant wrongfully discharged the said plaintiff, and without any reasonable cause or excuse refused to further carry out the said contract of employment and so informed the said plaintiff, and the said plaintiff then and there, refused to permit the said defendant to annul and cancel the said contract, and then and there offered the said defendant to continue in the faithful execution of h.. said contract of employment and to fully complete the same, but the said defendant then and there refused to permit the said plaintiff so to do, and then and there, and from thence on and to the end of the said year, prevented h.. from executing and carrying out the said contract and each and every provision thereof, and then and there and from such time on, and to the end of the said year, refused to pay h.. the amount due to h.. from week to week under and by the terms of the said contract or any part thereof; and the said plaintiff, ever since h.. said wrongful discharge by the said defendant has at all times been ready and willing to carry out and perform the said contract and would have done so in each and every particular, had not the said defendant wrongfully prevented h.. from h.. executing and carrying out the said contract as aforesaid.

Plaintiff further avers that, from the time of h.. wrongful discharge by the said defendant as aforesaid, and h.. wrongful refusal to execute and carry out the said contract and h.. wrongful refusal to permit h.. to execute and carry out the same, on h.. part, ..he has made all reasonable effort to find employment in the line of h.. said profession and occupation and has utterly failed to so find such employment without fault on h.. part; by means whereof the said plaintiff has been prevented by the said defendant from fulfilling and carrying out the terms of the said contract, and has been prevented by h.. from earning h.. said salary of dollars (\$.....) per week, or any other sum since the said breach of the said contract by the said defendant as above set forth, and said defendant has utterly failed and refused to pay to the said plaintiff h.. said salary under the terms of the said contract, and although often requested has not paid h.. the said salary of dollars (\$.....) per week, according to the terms of the said contract, since, to wit, the said day of, and has not paid to h.. the money due to h.. under and by the terms of the said contract or any part thereof, to the plaintiff's damage in the sum of dollars (\$.....).

994 Employment; general occupation, Narr. (Miss.)

That the said, during the summer of, entered into a contract with plaintiff,, by the terms of which contract plaintiff herein bound and obligated h..... to work for the said defendants in any honorable ca-

capacity for and during the period of months, beginning with and ending with, and by the terms of said contract the said defendants,, bound and obligated themselves to pay to plaintiff herein, the sum of dollars for each and every one of the said months above set out.

Plaintiff states that pursuant to and under the terms of said contract plaintiff went into discharge of h.. duties as an employee of the said and was put to work by them, and worked for the said defendants during the months of, for each of which months the defendants paid plaintiff the sum of dollars per month.

Plaintiff states that on the said defendants herein willfully and arbitrarily and without any reasonable excuse or justification for so doing discharged plaintiff and refused to further comply with the terms of said contract, and refused to allow plaintiff herein to continue in the employment of the said defendants under and by virtue of said contract, and refused to allow plaintiff herein to carry out h.. contract with the said defendants during the remaining months of said contract.

Plaintiff states that ..he stood ready and willing and did offer in good faith to carry out h.. part of the said contract, but that the said defendants,, willfully and arbitrarily and without reasonable excuse whatever and without any justification or right discharged plaintiff and refused to pay h.. for h.. services under the said contract during the remaining months of said contract.

Plaintiff further states that ..he used due diligence to obtain other and suitable employment during said and was unable to obtain such employment.

Plaintiff states that by virtue of said contract the said is indebted to h.. in the sum of dollars.

995 Employment; housekeeper, Narr. (Ill.)

For that whereas, the said defendants,, heretofore, to wit, on the day of, 19.., at, to wit, at said county, in consideration that the plaintiff had before that time, at the special instance and request of the said defendants, bestowed work, labor, diligence, care, attention and attendance and services of said plaintiff as housekeeper and attendant for said defendants at the city of, in said county, the said defendants undertook and then and there faithfully promised to pay said plaintiff the sum of dollars of lawful money, when the said defendants should be thereunto afterwards requested. Nevertheless, etc.

996 Employment; municipal employee, extra work

A regular employee of a municipal corporation has no right of action against it upon a *quantum meruit* for work performed outside of his regular hours.⁵⁰

997 Employment; public officer, action

A person who is entitled to a public office may sue for his salary for the time during which he has been wrongfully prevented from performing his duties of his office, regardless of his earnings or opportunities to earn during such time, where such salary has not been paid to any other person for the performance of the duties of the office.⁵¹

998 Employment; police officer, Narr. (Ill.)

For that whereas, before and at the times hereinafter mentioned, the city of, was, and for more than years last past has been, a municipal corporation in the said county of, and state of Illinois, incorporated and organized under an act of the legislature of said state, entitled: "An Act to provide for the incorporation of cities and villages," approved April 10, 1872, in force July 1, 1872.

That prior to that date said defendant was a municipal corporation, organized under a prior charter or act of the legislature; that the offices, positions and employments of (.) police patrolmen or policemen of the city of were created by an act of the legislature passed on, to wit,, 1 , and said act authorized the appointment of (.) police patrolmen or policemen, to hold their office, position or employment during good behavior, and such further number as the city council might from time to time provide for.

That on, to wit,, 1 , the legislature passed an act empowering the city council to increase the police force and the number of offices, positions and employments of patrolmen, on the recommendation of the board of police commissioners; that on, to wit,, 1 (Include other dates, if any), the city council of said defendant increased, by ordinance duly passed, upon said respective dates in each instance upon the recommendation of the board of police commissioners, the offices, positions or employments of police patrolmen by adding respectively; that on the day of, 1 , the city council of defend-

⁵⁰ May v. Chicago, 222 Ill. 595, 599 (1906).

⁵¹ Bullis v. Chicago, 235 Ill. 472, 480.

ant passed an ordinance, which is recorded on page .. of the city council proceedings of the city of for the years 1..., 1... and 1..., in and by which ordinance the city council provided that all members of the police force, including the police patrolmen or policemen, who were then in the employ of the city should be, and did from that time henceforth, constitute the patrolmen, officers and the police force of the city of, and said ordinance also provided the oath to be taken, and the duties of patrolmen.

That on the day of, 1.... the city council of defendant, by an ordinance duly passed, which is recorded on page of the council proceedings of 1..., provided a classification of the patrolmen, and the number of patrolmen that were then upon the police force of said city; that on the day of, 1..., the city council of defendant duly passed and published an ordinance of the city of, which is recorded on pages to and the pages following, of the council proceedings for the years 1....., for the appropriation for policemen at dollars each.

That on, 1...., the city council of defendant duly and regularly passed an order authorizing the superintendent of police to increase the number of police officers or employees on the police force by filling vacancies wherever they existed up to and not to exceed patrolmen, that being the number authorized to be appointed under the appropriation budget of 19....; that said order so passed as aforesaid was in legal effect an ordinance of said defendant.

That on, 1...., there was duly passed by said defendant an ordinance of said defendant, which occurs in volume of the Revised Code of, 1...., as chapter, and which creates an executive department of the municipal government known as the department of police, embracing the superintendent of police, certain officers of police, and the police patrolmen that have been appointed or may be authorized by ordinance.

That from time to time since 1...., the common council have authorized the appointment and employment of large numbers of police patrolmen, until the number authorized and appointed has reached the number of, to wit,; and that on, to wit,, the defendant duly passed an ordinance of said city, by vote of two-thirds of all the aldermen elected, together with the signature and assent of the mayor, in and by which ordinance it is ordained and ordered that the police force shall consist of (.....) police patrolmen, together with the other officers.

That by the said ordinance creating said executive department there was created the office of superintendent of police, which superintendent, by the provisions of said ordinance, was to be the head of said police department, and was to be ap-

pointed by the mayor of said city, by and with the consent of the city council, on the first Monday in, 1...., or as soon thereafter as may be, and biennially thereafter.

That the council of the said city of, as hereinafore referred to, consists of a board of aldermen, who were duly elected from their respective wards, by a plurality of all votes cast at their respective elections, and that the ordinances hereinbefore referred to were duly passed by a two-thirds vote of all of said aldermen so elected, and holding the office at the respective times at which said ordinances were passed.

That was duly elected mayor of the said city of by a plurality of all the votes cast at an election held in the said city of on the first Tuesday of, 1...., and duly qualified as said mayor on the first day of, 1....; that was on, to wit, the first Monday of, 1...., duly appointed by said mayor of said city of, by and with the advice and consent of the city council of said city, as superintendent of police, and then and there began to, and did, take charge of the office of superintendent of police, and conduct the business of said superintendent of police, and was afterwards, to wit, on, 1...., on recommendation by the mayor, duly confirmed by the council of said city of, as the superintendent of police, and thereupon became such superintendent of police, and under said appointment and like reappointments he continued to hold the position, and be the superintendent of police of said city, until, to wit,, 1....

That heretofore, to wit, in the year, before the city election of that year, held on the first Tuesday of, 1...., more than one thousand of the legal voters of the said city of, voting at the last preceding election, petitioned the judge of the county court of county, in which said city is located, to submit to the vote of all the electors of said city the proposition as to whether such city, and the electors thereof, shall adopt and become entitled to the benefits of the civil service act.

That the county court thereupon submitted such proposition at the next succeeding city election, and an order was entered of record in said county court submitting such proposition as aforesaid; that the said judge of the county court of county gave at least ten days' notice of the election at which such proposition was to be submitted, by publication of such notice in one or more newspapers published within said city, for at least five days; the first publication was at least ten days before the day of election; said election was held under the election law in force in said city, on, to wit, the first Tuesday of, 1...., and the proposition so to be voted for appeared in plain, prominent type at the head of every ticket,

and preceding the names of persons to be voted upon for the various offices at said election.

That a majority of the votes cast upon such proposition were for such proposition, and the said civil service act was thereby adopted by said city, and the mayor thereupon issued a proclamation declaring said act in full force in said city; and not less than forty or more than ninety days thereafter said mayor appointed three persons, who constitute and are known as the civil service commissioners of said city, one for three years, one for two years and one for one year from the time of their appointment, and until their respective successors are appointed and qualified; and in every year thereafter the mayor did in like manner appoint one person as a successor of the commissioner whose term expired in that year, to serve as such commissioner for three years, and until his successor is appointed and qualified.

Said commissioners were appointed from time to time by the mayor until the said day of, 1...., when, and were the commissioners aforesaid, and duly appointed as aforesaid by the mayor of the city of; that said commissioners have classified all of the offices and places of employment in said city of, with reference to examinations provided for in the civil service act, except those offices and places of employment mentioned in section of that act, and the offices and places so classified by said commission constitute the classified civil service of said city, and the position or employment of patrolmen was duly classified by said commission, and is under the Civil Service act, and constitutes part of the classified civil service of said city; that said commission made rules to carry out the purpose of the said act, for examinations, appointments and removals, in accordance with its provisions.

That the first board of civil service commissioners in 1...., at the request of the chief executive officers of the said city of and the comptroller of said city, adopted the practice of passing upon and certifying all payrolls of the employes of said city of, including the payrolls of all policemen in the employ of said city, which practice has continued from thence hitherto; and it was then and ever since has been required by the comptroller of the said city that all payrolls of the city of, including the police payroll, should be so certified as a condition precedent to payment thereof.

That on, to wit,, 1...., plaintiff was a citizen of the United States of America above the age of twenty-one years, and for more than two years prior thereto had been continuously a resident of the city of, in said county and state, and was then a qualified elector of said city

of, and had never been a defaulter to said municipal corporation, the city of

That on, to wit,, 1...., plaintiff took what is called the civil service examination, as to his qualifications for the position or employment of patrolman of the city of, which examination was conducted by and under the direction of the civil service commissioners of the city of Upon the said examination plaintiff was passed as duly qualified for the position or employment of patrolman of said city, having passed with a grade of, to wit, per cent upon a scale of one hundred per cent.

That on, to wit,, 1...., said superintendent of police notified said commission of a vacancy in the positions or employments of patrolmen, and said commission certified to the said superintendent of police the name and address of your petitioner, as standing highest upon the register for the class or grade to which said position belongs, and the said superintendent of police notified said commission of the position or employment of patrolman to be filled separately, and filled such place by the appointment of plaintiff, certified to him by said commission. That the position or employment of patrolmen in the city of is not such a position or employment as is provided for in section II of the said Civil Service act.

That plaintiff on, to wit,, 1...., took the oath prescribed for such patrolmen, and at once entered upon his duties as patrolman of the city of, under the Civil Service act, and the ordinances of said city.

That on, to wit, the day of, 1...., said civil service commissioners certified to the comptroller of said city the appointment of plaintiff to the position or employment of patrolman in the classified service of said city; and plaintiff avers that he still is a patrolman of said city of, duly appointed and qualified, and lawfully entitled to all the rights and privileges of said position or employment, including the right to be paid as patrolman from time to time thereafter, as hereinafter claimed. That during all the said time said plaintiff has never violated any of the rules prescribed by the authorities of the city of for the regulation of the police department, nor any of the rules of the civil service commission, nor any of the provisions of the Civil Service act.

That for, to wit, years next prior to, plaintiff was from month to month duly certified by said civil service commission upon the payrolls of said city, as a police patrolman entitled to pay as patrolman of said city; and that upon such payrolls he was, until, paid from month to month as patrolman.

That he has never been laid off for lack of work or lack of funds, or for other necessary cause; that by the appropria-

tion made by defendant in or about the month of,
, for the payment of officers and patrolmen in the employ-
 ment of said city, and for other municipal purposes, for the
 year, there was an appropriation made for police
 patrolmen of said city, including dollars (\$.....)
 per year for plaintiff, payable monthly; and that in like man-
 ner in or about the months of, 1....,,
 1.... and, 1...., there were further appropri-
 ations made by the defendant, for the payment of police patrol-
 men of the said city, for the years respectively 1...., 1....
 and 1...., including dollars (\$.....) per year
 for plaintiff, payable monthly; and that said appropriations
 were made for the benefit of all police patrolmen and police
 officers of said city, including plaintiff among the number.

That defendant prevented plaintiff from occupying the posi-
 tion, office or employment of patrolman from, to wit,,
 1...., to, to wit, 1.... (at which last date he
 was reinstated in said office or employment) without just cause
 or excuse, and refused without just cause or excuse to pay him,
 nor did said defendant pay to any other person, officer, em-
 ployee or patrolman, the money appropriated for his said posi-
 tion or employment during said time; that plaintiff made due
 and diligent effort to obtain employment after he was refused
 said employment, but was unable to obtain any other employ-
 ment except for a short period, during which he earned, to wit,
 \$.....

By reason of all of which the defendant became liable and
 promised to pay the plaintiff the sum of dollars
 (\$.....) per month from, 1...., to,
 1....; yet the defendant, though often requested, has not paid
 said sums of money, or any part thereof.

.....,
 Attorney for plaintiff.

999 Employment; superintendent gas plant, Narr. (Ill.)

For that whereas, heretofore, on, to wit, the
 day of, 19.., the defendant.., in con-
 sideration of the plaintiff's promise to enter into the service of
 the defendant.. for a term of, to superintend
 the construction of a gas plant then contemplated, in the city
 of, and of similar plants in other cities if de-
 sired by said defendant.., to superintend the manufacture of
 gas, to design and superintend the construction of apparatus
 and machinery by which gas is used, and to do such other duties
 in connection with the defendant..' business as the defendant..
 might designate, at a compensation of dollars
 (\$.....) per year, payable in monthly instalments, undertook
 and agreed to pay the plaintiff in addition to his said salary
 of dollars (\$.....) per year for,
 three-eighths of one cent per pound for each pound of carbonic

acid gas sold from the plant then about to be constructed at the works of, in, for a term of years following said date, such payments of three-eighths of one cent per pound to be made in monthly instalments at the end of each month for the gas manufactured and sold during the previous month; and the plaintiff avers that he did then and there enter the employ of the defendant.. and remained in the employment of the defendant.. for and did superintend the construction of the plant then contemplated in and of such other similar plants in other cities as the defendant.. desired or required, and did design and superintend the construction of apparatus and machinery by which such gas was used, and did perform such other duties in connection with the defendant..' business as the said defendant.. designated, all for the full term of, and did fulfill and perform all agreements by him to be performed according to the terms of the said contract; yet the defendant.. not regarding aforesaid promises, but contriving and intending to wrong and defraud the plaintiff, failed and refused to fulfill aforesaid promises in this, that although in the months of, a large amount of gas was manufactured and sold at said plant of said to wit, the amount of pounds, for which the plaintiff by virtue of said agreement was entitled to the sum of, to wit, dollars (\$.....), nevertheless the defendant.. although often requested thereunto did not nor would pay the plaintiff the said sum of, to wit, dollars (\$.....), but of said sum ha.. paid the plaintiff only the sum of, to wit, dollars (\$.....), and ha.. failed and refused and still do.. fail and refuse to pay the plaintiff the said balance to wit, dollars (\$.....), or any part thereof, to the damage of the plaintiff in the sum of dollars (\$.....); and therefore he brings this suit, etc.

1000 Employment; theatrical manager, Narr. (Ill.)

For that whereas the plaintiff, being a joint owner of a valuable leasehold estate, to wit, a lease for a term of years of the premises known as the, in, of great value, to wit, the sum of \$....., on or about the day of, 19...., in the city of, to wit, in the place aforesaid, entered into a certain contract or agreement with the defendant, whereby it was agreed that in consideration that the plaintiff should assign all his interest in the said leasehold estate to the defendant, the defendant would employ him (the plaintiff) as manager of the said theater for the term of years, at a salary of dollars a week, and per cent of the net profits of the theatrical business to be conducted by defendant

on said premises, to be accounted and paid at the end of each and every theatrical season during said term; that said plaintiff accepted said employment and arrangement in good faith, and did, to wit, on the day of, 1...., so assign all his interest in said lease to the defendant; that, to wit, on the day of, 1...., the said plaintiff accepted and entered upon his position as manager as aforesaid, and continued to perform his duties in accordance with said contract in a competent and conscientious manner up to about the day of, 1....; that on the day of the date last aforesaid the defendant wrongfully, unlawfully and in violation of his said contract discharged the plaintiff, and thereafter, though often requested, has altogether refused to perform his said contract, or to pay to the plaintiff any of the said sums so due as aforesaid, to the damage of the plaintiff of dollars, etc.

1001 Fees of officers, constables

At common law an action of assumpsit is maintainable by officers to collect their fees.⁵² This action is not superceded by the statutory remedy which permits the making up of a fee bill and its placing in the hands of an officer for collection.⁵³ The defendant in an attachment or execution is liable in an action of assumpsit to a constable for the expenses incurred by him while preserving the property levied upon under the writ.⁵⁴

FIRE INSURANCE

1002 Proof of loss

(Venue)

Be it known that on this day of, 19.., before me, a notary public, legally qualified and residing in said county and state, personally appeared, of the county of, and state of Illinois, who being duly sworn, according to law, declares under oath that the of, through its agency at, Illinois, did on the day of, 19.., issue to their policy of insurance, No., the written body of which, with its immediate context is as follows: No., dollars. By this policy of insurance the, in consideration of and of dollars, will indemnify against loss dollars, on the one story frame building and

⁵² Morton v. Bailey, 1 Scam. 213, 28, c. 33, Hurd's Stat. 1909, p. 618. 215 (1835).

⁵⁴ Eames v. Hennessy, 22 Ill. 629,

⁵³ Morton v. Bailey, *supra*; Sec. 632 (1859).

additions attached thereto now and to be occupied by assured or tenant as a dwelling, and situate on assured's farm in section, in county, Illinois. dollars on household furniture, useful and ornamental, kitchen furniture and utensils, family wearing apparel, printed books, plate and plated ware, paintings and engravings and their frames (in case of loss no one to be valued at more than cost), piano, organ, sewing machine, family supplies and fuel, all while contained therein. Reference is hereby had to assured's application No., which is made a part of this policy and a warranty on the part of the assured. (Here follows the usual "lightning clause"), then steam power permitted for threshing, not to be set nearer than yards to the house insured. dollars additional insurance on item permitted; which said policy was duly issued and delivered to affiant on the day of, and by its terms the affiant was insured against loss for a period of years from, 19.., to, 19.., at noon.

That in addition to the amount covered by said policy of said company there was dollars other insurance made thereon, to the amount of dollars as specified herein: On household furniture therein, on beds and bedding therein and on wearing apparel therein, and on provisions therein, and on sewing machine therein dollars. On piano therein dollars, contained in dwelling house in section, besides which there was no insurance thereon; the above amount being insured by the of, Illinois.

That on the day of, 19.., a fire occurred by which the property insured was totally destroyed, and the assured under above described policies suffered loss to the amount of dollars on the property covered by said policy as set forth in the accompanying schedules marked respectively, schedule "A" and schedule "B," which affiant declares to be a just, true and faithful statement of the loss of assured so far as he has been able to ascertain the same, and he states that schedule "A" correctly sets forth the plan of assured's building, and its value immediately before said fire, and schedule "B" the values of all the articles of personal property in cash at the time of the fire.

That the actual cash value of the property so insured amounted as set forth in said schedules "A" and "B," which are made a part of this affidavit, to the total sum of dollars on dwelling insured under first item in said policy, and dollars on contents of same as described in the second item in said policy, at the time immediately preceding the fire, as will appear by the said annexed schedules, showing a full and accurate description of each kind of property, and the value of the same with the loss on each stated separately.

That all the property insured, and which is described on said schedules belonged to the assured,

That the building insured, and which contained the property destroyed was occupied solely by the assured for a private dwelling and for no other purpose.

That said fire occurred on the day of, 19.., and was first discovered about o'clock in the afternoon of said day, and originated from a cause totally unknown to affiant, or to either of the assured; that on said day affiant and his wife, left home about o'clock noon on said day and went to about miles distant; that the fires were carefully looked to and that the fire in the kitchen stove had died out entirely, as an early dinner had been provided in anticipation of getting an early start; that only a very small amount of fire was left in the fire-place, and this was carefully covered by affiant.

The fire was first discovered by a neighbor who went for assistance, and when he with another neighbor reached the house the roof had fallen in, or was just on the point of doing so, as affiant is informed and believes, and that when he returned about a half hour before sunset the house was entirely burned up. Nothing whatever was removed from the house.

By reason of which fire the assured under said policy have sustained a total loss under same, and present their claim for the full amount thereof, being dollars on the first item, and dollars on the second item, and in all dollars.

And the said affiant further declares that the fire did not originate by any act, design or procurement on the part of the assured or of either of them, or in consequence of any fraud or evil practice done or suffered by them, or either of them, and that nothing has been done by, or with, their privity or consent to violate the conditions of said policy of insurance, or to render the same void.

Subscribed, etc.

.....

Notary's certificate

(Venue)

I, a notary public in and for said county, do hereby certify that I am a resident of, and reside about miles from the site of the house described in within proof of loss; that I am in no way concerned in the loss as a creditor or otherwise nor related to the assured; that I have carefully examined the circumstances attending said loss; that I know the character and circumstances of assured and verily believe that the assured have, without fraud, sustained loss on the property described in schedules "A" and

"B" hereto attached to the amounts therein, and in said proof of loss stated.

Witness, etc.

(Notary Public)

Schedule "A"

Being a plan of the house of insured under policy No. of the of and which has been destroyed by fire, and an itemized statement of the value thereof.

The following is a statement of the materials, labor, etc., in said house. (Insert itemized statement)

The foregoing is what I consider a fair estimate as to quantities and values:

Said house was completed in 19.., and has since been occupied as a private dwelling by assured, husband and wife, and family, consisting of one child now years old, and no other.

(Attach plan of house, in ink)

Schedule "B"

List of personal property lost by fire and which were insured under policy No. of the and which belonged to with the present cash value of each article at the time of said fire. (Insert articles and values.)

1003 Arbitration

Under a policy providing for an award and arbitration in case of loss by fire, a submission to arbitration, if not waived, is a condition precedent to the right to maintain an action on the policy.⁵⁵

1004 Parties

An action on a fire insurance policy must be brought by the person or persons having an insurable interest at the time of the loss.⁵⁶

1005 Bridge destroyed, etc., Narr. (Md.)

For that on the day of, in the year 19.., by its policy of insurance issued as of that date, and in consideration of the stipulation therein named and of the payment of dollars and cents (\$.....), as a premium, the said company of

⁵⁵ Southern Home Ins. Co. v. Faulkner, 57 Fla. 194, 198 (1909).

⁵⁶ Dix v. Mercantile Ins. Co., 22 Ill. 272 (1859).

county, defendant, promised and agreed with the, plaintiff, to insure it, subject to the conditions therein named, and for and during the period commencing on the day of, 19.., at noon, to the day of 19.., at noon, to the extent of dollars (\$.....) against all direct loss or damage by fire on that part of main located in county. Other insurance permitted without notice until required. Permission to make ordinary alterations and repairs and to carry over, attach and maintain telegraph and telephone wires through and on the roof and sides of said bridge; and which said loss when it did occur, the said insurance company did agree, subject to the terms of its policy, to pay to the plaintiff within ninety days after due notice, ascertainment, estimate and satisfactory proof of loss was received.

That on the day of, 19.., and during the time prescribed in said policy, the said bridge therein described and owned by the plaintiff was consumed and totally destroyed by fire; that forthwith the plaintiff did give notice thereof to the defendant company and furnish the proof of loss required, and offered and tendered itself ready and willing to furnish such other proof as the defendant's officers and agents should reasonably demand; and the plaintiff did thereupon demand of the defendant the payment of the amount for which it was insured under said policy, which demand said defendant has neglected and refused to pay and perform; that such fire and such consequent loss were not such as were by said policy of insurance excluded from its operation and effect, but were such as were reasonably and legitimately included within the provisions of said policy of insurance of the defendant; and that all times have elapsed and all things and conditions have happened and have been performed, which, under the terms of said policy of insurance were necessary to have elapsed and to have been performed to entitle the plaintiff to the said payment and to have and maintain this action.

And therefore the plaintiff brings this suit and claims dollars (\$.....)

1006 Chattels on farm, Narr. (Md.)

For that the plaintiff was the owner of certain chattels described in a certain policy No., issued by said defendant company on the day of, 19.., situated on the farm of, about mile.. west of, at the time of this insurance against fire and also at the time of their destruction by fire as hereinafter set forth; that on the day of, 19.., and theretofore, the defendant was and still is a corporation of the state of Maryland, duly incorporated with authority to insure risks by fire; that on the said day in consideration of

the membership of said plaintiff in said defendant company and the passing and issuing of a certain note of hand of said plaintiff, dated on the said day of, for the sum of (\$.....) dollars, payable on demand, and bearing interest at such rate as may be fixed by the board, not exceeding per cent (...%) per annum, said defendant executed to said plaintiff a certain sealed policy of insurance number on the said chattels, wherein said defendant insured said plaintiff, his executors, administrators or assigns, agreeably to the terms and conditions of the said company, for (\$.....) dollars, against all loss or damage by fire or lightning that may happen at any time after the date of said sealed policy, so long as the terms and conditions annexed to said policy are complied with, or until canceled by order of the company; that on the day of, 19.., a part of said chattels, insured under said policy to the sum of (\$.....) dollars, were totally destroyed by fire, that the plaintiff's loss by said fire, insured by said policy, was (\$.....); that the plaintiff furnished to the defendant full proof of said loss and interest, and duly performed all the conditions of the said policy on his part, but that the defendant has not paid the said loss; and the plaintiff says that said policy has never been canceled by order of said defendant company, and that at the time of the happening of the fire aforesaid, was in full force and effect. And the plaintiff claims therefore \$.....

1007 Dwelling, Narr. (Ill.)

For that whereas the defendant on, to wit, the day of, 19.., in, to wit,, in the county and state aforesaid, made its policy of insurance and delivered the same to the plaintiff and for the consideration therein expressed promised the plaintiff in the terms of said policy and the conditions thereto annexed, which said policy and conditions here follow in the words and figures following, to wit: (Insert copy of policy).

And the plaintiff avers that at the time of the making of the said policy and from thence until the happening of the loss and damage hereinafter mentioned, it had an interest in the said property to the amount of the said sum so by the defendant insured, as aforesaid; and the plaintiff further avers that on, to wit, the day of, 19.., the said property was consumed and destroyed by fire; whereby the plaintiff then and there sustained loss and damage on the said property to the full amount of the sum mentioned in the said policy of insurance, and which said loss happened without fraud or evil practice of this plaintiff.

And the plaintiff further avers that forthwith, after the happening of said loss and damage, on, to wit, the

day of, 19., it there gave notice thereof to the defendant and as soon thereafter as possible on, to wit, the day of, 19., there delivered to the defendant as particular an account of the said loss and damage as the nature of the case would admit, which said account was signed by, of and for this plaintiff; which said account, also called "Proof of Loss," stated the number of the policy of insurance, the same being, to wit, No.; that the total insurance then carried on the premises was dollars and no more; that the property described in the said policy belonged at the time of the fire heretofore mentioned to this plaintiff; that the real estate was owned by this plaintiff in fee simple; that there were no encumbrances of any nature or amount at the time of the fire; that the building described, or containing the property described, in said policy was occupied as a, by this plaintiff at the time of the fire; that no assignment, transfer or encumbrance, or change of ownership or occupancy of the property described had been made since the issuing of the aforesaid policy; that the fire occurred on the day of, 19.; at about the hour of o'clock P. M.; that the cause of the said fire was unknown, but was probably spontaneous combustion of in the; that the amount claimed by the plaintiff of the said defendant was the sum of dollars; that the said fire did not originate by any act, design or procurement on the part of the assured, being the said plaintiff, or in consequence of any fraud or evil practice done or suffered by said assured; that nothing has been done by or with the privity of the assured, being this plaintiff, to violate the conditions of the policy, or render it void; that no articles were mentioned in the said account but such as were in the building damaged, or destroyed, and belonging to and in possession of the said assured, being this plaintiff, at the time of the said fire; that no property saved had been in any manner concealed and that no attempt to deceive the said, being the defendant herein, had in any manner been made as to the extent of the said loss and damage; that the said account of the said loss and damage was accompanied by the oath of, of and for this plaintiff, and accompanied by his oath that the statements made in said account were true; and to the said account, also called "Proof of Loss," was annexed and therewith delivered a certificate under the hand and seal of a notary public nearest to the place of the said fire, to wit,, showing that he, the said notary, was not concerned in the loss or claim set forth in said statement or Proof of Loss, either as a creditor or otherwise; that he was not related to the assured or sufferers; that he had examined the circumstances attending the fire and damages, as alleged; that he was well acquainted with the character and

circumstances of the assured, and did verily believe that the assured had by misfortune, and without fraud or evil practice, sustained loss and damage on the property described in the policy aforesaid, to the amount of \$..... And plaintiff further avers that, although it has kept and performed all things in the said policy contained on its part to be kept and performed, and, although it has sustained loss and damage by fire on the said property in the manner and to the amount aforesaid, nevertheless, the defendant, though often thereto requested, has not yet paid to the plaintiff that amount, or any part thereof, but refuses so to do, to the damage of the plaintiff of dollars, and therefore the said plaintiff brings his suit, etc.

b

For that whereas heretofore, to wit, on the day of, 19.., to wit, at the county aforesaid on the application of the plaintiff, in consideration of a certain sum of money in the policy mentioned and paid to it by the plaintiff, the defendant made a certain policy of insurance in writing and delivered to the plaintiff its said policy of insurance, being in the words and figures following: (Set out policy of insurance *in hacc verba*).

And the plaintiff avers that at the time of the making of the said policy of insurance, as aforesaid, and from then until the loss and damage hereinafter mentioned, he had an interest in the said insured premises and property to a large amount, to wit, to the amount of all the money insured thereon to wit, at aforesaid.

And that afterwards, to wit, on the day of, 19.., the said premises and property in the said policy of insurance mentioned was burned, consumed and destroyed by fire, which did not happen by an invasion, insurrection, riot, or civil war or commotion, or by any military or usurped power, or by order of any civil authority, or by theft or by neglect of the insured to use all reasonable means to save and preserve the property at and after the fire, or by explosion of any kind: whereby the plaintiff sustained damages to a large amount, to wit, to the amount of the money thereon assured, to wit, at in the county aforesaid.

And the plaintiff further avers that the said premises and property mentioned at the time of the destruction thereof, as aforesaid, was also insured for the sum of dollars in of and the for the sum of dollars, no part of which has been paid.

And the plaintiff avers that the said buildings in the said policy mentioned was not at any time during the continuance thereof appropriated, applied, or used to or for the purpose of carrying on or exercising therein, any trade, business or vo-

cation denominated hazardous or extra-hazardous, or for keeping or storing in said building, or manufacturing or using therein, any of the spirits, gases, oils, explosives, or products prohibited in and by the provisions of said policy.

And plaintiff further avers that after the destruction of the said property as aforesaid, the said plaintiff performed all of the acts and things required of him by said policy to be performed by giving notice of loss and making proof thereof; and the defendant then and there, to wit, on the day of, 19.., received and accepted the said proof as satisfactory; and waived any and all other acts in respect thereof on the part of the plaintiff.

And the plaintiff further avers that although he has kept and performed all things in the said policy contained on his part to be kept and performed, and although he has sustained loss and damage by fire on the said property in the manner and in the amount aforesaid, nevertheless the defendant, though often requested, has not yet paid the plaintiff that amount, or any part thereof, but refuses so to do, to the damage of the plaintiff of dollars; wherefore he brings suit, etc.

c

For that whereas the defendant on the day of,, in the city of, county and state aforesaid, made its policy of insurance and delivered the same to F and N, assignors of the plaintiff, and for the consideration therein expressed, did insure the said F and N against loss or damage by fire, to the amount of (\$.....) dollars, in the terms of the said policy and the conditions thereto annexed; and at a time subsequent to the loss and damage by fire, as hereinafter set out, and previous to the bringing of this suit, the said F and N assigned all their right, title and interest in and to said loss and damage in the terms of said policy and conditions thereto annexed, which said policy and conditions here follow, in these words and figures, to wit: (Insert copy of policy).

And the plaintiff further avers that at the time of the making of the said policy, and from thence until the happening of the loss and damage hereinafter mentioned, the said F and N, assignors of the plaintiff, had an interest in the said property to the amount of the said sum so by the defendant insured thereon as aforesaid.

And the plaintiff further avers, that on the day of,, about the hour of o'clock P. M., the said property was consumed and destroyed by fire, whereby the said F and N then and there sustained loss and damage on the said property to the amount of the sum last aforesaid, which said loss and damage did not happen by means of any invasion, insurrection, riot, civil commotion, or of any

military or usurped power. And the plaintiff further avers that forthwith after the happening of the said loss and damage, to wit, on the day of, 19..., the said F and N there gave notice thereof to the defendant, and as soon thereafter as possible, to wit, on this same day there delivered to the defendant as particular an account of the said loss and damage as the nature of the case would admit; which said account was signed by the said F and N and accompanied by their oaths that the same was in all respects just and true, and showed the value of the said property, and in what general manner the said building was occupied at the time of the happening of the said loss and damage, and the name of the person then in the actual possession thereof, and when and how the said fire originated, so far as the said F and N knew or believed, and their interest in the said property at that time; to which said account was annexed and therewith delivered, a certificate, under the hand and seal of the notary public nearest to the place of the said fire, to wit, S, who is not concerned in the loss as a creditor or otherwise nor related to assured, showing that he, the said notary had examined the circumstances attending the said fire and the loss and damage alleged, and was acquainted with the character and circumstances of the plaintiff and verily believed that the plaintiff had by misfortune, without fraud or evil practice, sustained loss and damage on the said property to the amount of dollars.

And the plaintiff further avers that the building which contained the said property insured was not at or since that time appropriated, applied or used to or for the purpose of carrying on or exercising therein any trade, business or vocation denominated hazardous or extra-hazardous or specified in the said memorandum of special rates, or for the purpose of storing therein any of the articles, goods or merchandise in the said conditions denominated hazardous or extra-hazardous, or included in the said memorandum of special rates.

And the plaintiff further avers, that although the said F and N have kept and performed all things in the said policy contained on their parts to be kept and performed, and although they have sustained loss and damage by fire on the said property, in the manner and to the amount aforesaid, nevertheless the defendant, though often thereto requested has not yet paid to the said F and N, or to the plaintiff, that amount, or any part thereof, but refuses so to do, to the damage of the plaintiff of dollars, and therefore he brings his suit, etc.

d

For that whereas, the defendant, on to wit, the day of, 19..., in the city of, in the county aforesaid, made its policy of insurance and de-

livered the same to the said, and for the consideration therein expressed, promised the said, in the terms of the said policy and the conditions thereto annexed, which said policy and conditions here follow in these words and figures, to wit, (Set out policy *in hacc verba*).

And the plaintiff avers that on, to wit, the day of, 19.., she assigned all of her right, title and interest in and to the said policy of insurance and all benefits and advantages to be derived therefrom, to the said, which said assignment was approved and consented to by the said defendant, which said assignment, approval and consent are endorsed on the back of the said policy of insurance, in words and figures as follows: (Set out assignment).

And the plaintiff further avers that on, to wit, the day of, 19.., the said assigned all of his right, title and interest in and to the said policy of insurance and all benefits and advantages to be derived therefrom to the said, and that the defendant approved and consented to the said assignment, which said assignment, consent and approval is in writing, attached to the said policy of insurance, and is in words and figures, as follows: (Set out second assignment).

And the plaintiff further avers that at the time of the making of the said policy and from thence until, to wit, the said day of, 19.., had an interest in the said property to the amount of the said sum so by the defendant insured thereon as aforesaid, and that since the time of the making of the said assignment of the said policy by the said to the said, the said had an interest in the said property to the amount of the said sum so by the defendant insured thereon as aforesaid, and that the said, since the time of the said assignment to him from the said and until the happening of the loss and damage hereinafter mentioned, had an interest in the said property to the amount of the said sum so by the defendant insured thereon, as aforesaid.

And the plaintiff further avers that on, to wit, the day of, 19.., the said property was consumed and destroyed by fire, whereby the said then and there sustained loss and damage on the said property to the amount of dollars and cents, which said loss and damage did not happen by means of any invasion, insurrection, riot, or civil commotion, or of any military or usurped power.

And the plaintiff further avers that forthwith, after the happening of the said loss and damage, to wit, on the day of, 19.., he there gave notice thereof to the defendant, and as soon thereafter as possible, to wit, the

..... day of, 19.., the said delivered to the defendant as particular an account of the said loss and damage as the nature of the case would admit, which said account was signed by the said and accompanied by his oath that the same was in all respects just and true and showed the value of the said property, the occupancy of the said building at the time of the happening of the said loss and damage, and when and how the said fire originated, as far as the said knew or believed, and his interest in the said property at that time, to which said account was annexed and delivered therewith, a certificate under the hand and seal of the notary public nearest to the said place of the said fire, to wit, showing that he, the said notary had examined the circumstances attending the said fire and the loss and damage alleged, and was acquainted with the character and circumstances of the said and verily believed that the said had by misfortune and without fraud or evil practice, sustained loss and damage on the said property, to the amount of dollars and cents.

And the plaintiff further avers that there was not, at or since the time of making of said policy, any other insurance on the said property, and that the said building was not at or since that time, appropriated, applied or used to or for the purpose of carrying on or exercising therein, any trade, business or vocation denominated as hazardous, or extra-hazardous, or specified in the said memorandum of special rates, or for the purpose of storing therein any of the articles, goods or merchandise in the said condition denominated as hazardous or extra-hazardous, or included in the said memorandum of special rates.

And the plaintiff further avers that on, to wit, the day of, 19.., an agreement was entered into between the said, and the defendant in words and figures as follows: (Set out agreement for appraisal of loss etc.).

And that the said appraisers in said agreement mentioned made the following declaration: (Insert same).

And that the said appraisers in the said contract mentioned made the following award: (Set out award or appraisal).

Nevertheless, although the said plaintiff and the succeeding assignees of said policy have kept and performed all things in the said policy mentioned, on their part to be kept and performed, the defendant has not yet paid to the plaintiff the said amount of the loss and damage aforesaid, or any part thereof, but refuses so to do, to the damage, etc.

(Maryland)

(Precede this by common counts) And for that the defendant is a corporation, duly incorporated under the laws of

the state of, and during the times hereinafter mentioned was, and now is, engaged in the business of fire insurance in the city of, in the state of Maryland; issued policies and made contracts agreeing to pay certain sums of money, in the event that the party or parties named in said policies or contracts should sustain loss or damage by fire; and by one of its said contracts or policies in writing, commonly called an insurance policy, dated, 19.., and herewith filed, in consideration of dollars, paid by plaintiff to defendant, undertook and agreed to indemnify the plaintiff against loss or damage by fire to certain property therein described, to an amount not exceeding dollars (\$.....) on the two-story frame shingled roofed building and additions thereto occupied as a dwelling, situated on the side of near in the district of county, state of Maryland, and dollars (\$.....) on the household furniture, silver and plated ware, printed books and printed music, paintings and their frames, clocks, watches, jewelry, bicycles, sewing machine, trunks and other traveling equipments, family wearing apparel and stores; for the term of one year from the date of said policy; that is to say, the said company of, the defendant in this case, issued and delivered to the plaintiff in the above entitled case, a policy or contract of insurance on the property, as above described, and her interest therein, agreeing to indemnify her against any loss by the destruction or partial destruction thereof by fire prior to the first day of, 19..; that afterwards, to wit, on or about the day of, 19.., and while said policy was in force, the said dwelling and personal property covered by said policy was totally destroyed by fire; that the loss and damage to the said plaintiff on her said dwelling house was dollars (\$.....) and that on her furniture and other articles covered by the dollar clause of said policy, her loss and damage was dollars, (\$.....); that under the terms of the three-fourth value clause, attached to said policy, the plaintiff is entitled to be paid the sum of dollars (\$.....) for the loss and destruction of said dwelling and is entitled to be paid the sum of dollars and cents (\$....) for the destruction of the household furniture and other articles covered by the dollar clause of said insurance policy; and the plaintiff notified the defendant of the destruction and loss of said dwelling, household furniture and other articles covered by the said dollar clause in said insurance policy; and defendant's adjuster and agent visited said property and saw that it was totally destroyed. That said plaintiff furnished to the defendant full proof of her loss and damage, and otherwise duly performed

all the conditions and stipulations of said policy or contract on her part to be performed. That the defendant, the said company of has refused and still refuses to pay her, the said plaintiff the amount of said loss, due and owing to said plaintiff under said policy or contract of insurance, and has denied and denies all liability under said policy.

And the plaintiff claims therefore as her damages, the sum of dollars (\$.....)

(Michigan)

For that whereas, heretofore, to wit, on the day of, 19.., said plaintiff was the owner of certain property hereinafter described, and the said defendant was an insurance company engaged in the business of fire insurance in the state of Michigan and elsewhere; and thereupon, to wit, on the day of, 19.., the said defendant did issue to the plaintiff its policy of insurance numbered dated the day of, 19.., wherein and whereby for a premium of \$....., to said defendant in hand paid by the said plaintiff, the said defendant did insure the said plaintiff for the term of one year from and after the day of, 19.., at noon, to the day of, 19.., at noon, against all direct loss or damage by fire, to an amount not exceeding \$....., to certain property described and fully set forth in said policy of insurance, and described as follows, to wit: (Describe property insured), which said policy of insurance so covering and insuring said property above described was duly accepted by plaintiff, and is still held and retained by plaintiff.

And plaintiff avers that afterward, to wit, on the day of, 19.., direct loss and damage by fire occurred to the property above described, damaging the same to the extent of, to wit, upwards of \$.....

And plaintiff avers that there was other insurance upon the said property in favor of the plaintiff, and that the *pro rata* proportion of such loss under such policy to said defendant was, to wit, \$.....

And plaintiff avers that due notice of such loss and due and proper proofs of such loss were furnished to said defendant on, to wit, the day of, 19.., and plaintiff in all things conformed to the requirements of the contract between plaintiff and defendant. And although the time allowed by said policy for the payment of said loss has long since expired, yet the said defendant has wholly refused to pay said, to wit, \$....., or any part thereof, although heretofore, frequently requested so to do by plaintiff, to plaintiff's

damage \$. and interest and costs, and therefore she brings suit, etc.

1008 Furniture, Narr. (District of Columbia)

For that whereas, heretofore, to wit, on or about the day of, 19.., in the city of, in the District of Columbia, by a certain policy of insurance then and there made, for and in consideration of stipulations named and the payment by the plaintiff to the defendant of the sum of dollars as premium, the defendant did insure the plaintiff for the term of years from on or about the day of against all direct loss or damage by fire, provided that such loss was not caused by invasion, insurrection, riot, civil war or commotion or military or usurped power, or by order of any civil authority, or by theft, or by neglect of the insured to use all reasonable means to save and preserve the property at and after fire, or by an explosion of any kind, to an amount not exceeding the sum of dollars, on the following described property named in said policy of insurance, to wit, household furniture, (Describe property) all while contained in the story (frame), metal roof building, and while occupied by the assured as a dwelling and situated on lot number That by the terms of said policy the defendant agreed to pay the amount of any such loss, not exceeding the amount of said insurance at the expiration of days after the defendant had been furnished by the plaintiff with the proofs of such loss.

The plaintiff avers that at the time of the making of said policy of insurance and from thence until the loss and damage hereinafter mentioned, he was possessed as sole owner of said insured property in said policy mentioned and thereby intended to be insured; that the premium in said policy mentioned was at the time of the making thereof duly paid by him to the defendant; that after making of said policy and whilst the same was and remained in full force, to wit, on or about the day of, the said insured property was burned, damaged, consumed and destroyed by fire, whereby the plaintiff sustained loss and damage, to wit, dollars; and that although he has in all things conformed to and performed and observed all and singular the stipulations in said policy mentioned and on his part to be performed and observed according to the true intent and meaning thereof, and furnished proof of said loss on or about the day of in such a form as was acceptable to the defendant, acting through its general agent, due and formal proof thereof being by the said defendant, acting through said general agent expressly waived, the defendant has refused to pay him the said loss, or any part thereof, and the defendant and its agents have

refused to replace or repair the said insured property which was burned, damaged and destroyed as aforesaid with property of like kind and quality or with any property whatsoever, such refusal on the part of defendant being contrary to the true intent or meaning of the said policy of insurance and of the agreement of the defendant in that behalf made and set forth as aforesaid.

And the plaintiff avers that the defendant although often requested so to do, has refused to perform its said agreement and has broken the same and to perform the same does still refuse. (Add common counts)

(Maryland)

(Precede this by common counts) And for that the defendant by its contract in writing, commonly called an insurance policy, dated, 19.., and herewith filed, in consideration of dollars and cents paid by plaintiff to defendant, undertook and agreed to indemnify the plaintiff against loss or damage by fire to certain property therein described to an amount not exceeding \$. for the term of years from said date; and afterwards, to wit, on, 19.., and while said policy was in force, the said property described therein was totally destroyed by fire; and the plaintiff promptly notified the defendant thereof, and the defendant's adjuster and agent visited said property and saw that it was totally destroyed and the defendant waived the filing by plaintiff with defendant of the formal proofs of loss, and refused and still refuses to pay the amount of said loss, and denied and denies all liability under said policy, and the plaintiff complied with all the provisions of said policy on his part, except so far as compliance therewith was waived by the defendant, and the defendant unjustly refuses to pay said loss, and said loss exceeded \$.

And the plaintiff claims \$.

b

(Precede this by common counts) And for that on the day of, 19.., the said defendant, by its instrument of writing, otherwise known as an insurance policy, No., in consideration of the stipulations therein named, and of the sum of \$. premium paid to said defendant, did insure and cause to be insured, the said plaintiff,, for a term of time from the day of, in the year 19.., at noon, to the day of, 19.., at noon, against all direct loss or damage by fire, except as therein provided, to an amount not exceeding dollars, upon the household furniture

and other household chattels and effects therein mentioned, situate in the premises No. street,, Maryland.

That said plaintiff paid to said defendant the consideration aforesaid, and received and accepted from said defendant the policy of insurance aforesaid of said defendant.

That on the day of, 19.., a fire occurred in the premises No. street, occupied by said plaintiff, and destroyed and damaged the household furniture, goods, chattels and effects belonging to said plaintiff covered by said insurance policy of said defendant, to an extent in excess of said sum of dollars.

That said plaintiff notified said defendant in writing of said fire, and of his loss, and did otherwise fully and completely perform all of the requirements of said policy of insurance on his part to be performed.

That said plaintiff has demanded of said defendant the amount due said plaintiff by reason of the terms of said policy and his loss as aforesaid, but that said defendant has failed and refused to pay the same, notwithstanding that more than sixty days have expired since a full and complete proof of loss had been furnished to said defendant by said plaintiff.

That by reason thereof said plaintiff has suffered great loss and damage.

And the plaintiff claims dollars damages.

1009 Furniture and fixtures, Narr. (Fla.)

For that in consideration of the sum of dollars to it in hand paid and payment acknowledged, the said defendant issued to the plaintiff its policy of insurance and thereby promised the plaintiff in the terms of said policy and upon the conditions thereto annexed, to insure the plaintiff against loss and damage by fire to the amount of dollars and to make good unto said plaintiff the loss or damage that should happen by fire, not exceeding the said sum of dollars for the term of years from the day of, 19.., to the day of on the store fixtures and furniture including iron safe while contained therein to the extent of dollars, said furniture and fixtures being at that time and at the time the same was destroyed by fire in the store building and located on (Give legal description) the loss to be paid after days' notice, and proof made by the plaintiff and received by the defendant; and in said policy sundry provisions, conditions, prohibitions and stipulations were and are contained and thereto annexed, as by a copy of the original policy filed herewith and made a part of this declaration will more fully appear.

And afterwards, to wit, on the day of

the said store house above mentioned and the store furnishings and fixtures and trees were totally destroyed and burned by fire, and damage and loss was thereby occasioned to the said plaintiff to the amount of dollars on the store, furniture and fixtures, and dollars on the trees near said property under such circumstances as to come within the promise and undertaking of said policy and to render liable and oblige the said defendant to insure the said plaintiff to the said amount of dollars on the property aforesaid; of which loss the said defendant has had due notice immediately after said fire occurred and sent its adjuster and agent to the scene of said fire to adjust and pay said loss; at which time the said adjuster and agent of the defendant was furnished with all the evidence to be had as to the cause of said fire and all the other things appertaining thereto; and on the day of, within days after said fire, the plaintiff furnished the defendant with formal proofs of loss which the defendant has kept and has made no objections thereto; and although all conditions and requirements contained in said policy of insurance so issued, as aforesaid, have been performed and fulfilled and all events and things existed and happened and all periods of time have elapsed to entitle the plaintiff to a performance by the defendant of said contract, and to entitle the plaintiff to said sum of dollars, and nothing has occurred to prevent the plaintiff from maintaining this action, yet the said defendant has not paid nor made good to said plaintiff the said amount of loss and damage aforesaid, or any part thereof, but refuses so to do.

⁵⁷ That the plaintiff has had to employ an attorney at law to collect the amount due the plaintiff under the terms of said policy of insurance because of the damage and loss so sustained by him as aforesaid and because the defendant has failed and refused to pay the same; and the plaintiff claims dollars as a reasonable fee or amount or compensation to pay his said attorney for being forced by the defendant to collect said amount so due, as aforesaid, under the terms of said policy of insurance, which said amount the defendant is required to pay.

1010 Saw-mill and plant, Narr. (Ill.)

For that whereas, the defendant, on the day of, 19.., at, to wit, the county of and state of, made its policy of insurance, and delivered the same to the plaintiff, and for the consideration therein expressed promised the plaintiff, in the terms of said policy and

⁵⁷ In an action upon a fire insurance policy, attorney's fees are recoverable under the Florida statute, the validity of which has been upheld. *Hartford Fire Ins. Co. v.*

Redding, 47 Fla. 228, 232, 233 (1904); c. 4173, Act 1893; *Tillis v. Liverpool & London & Globe Ins. Co.*, 46 Fla. 276.

the conditions thereto annexed, which said policy and the conditions here follow in these words and figures, to wit: (Set out contract of insurance *in hæc verba*).

And the plaintiff further avers that at the time of the making of said policy and from thence until the happening of the loss and damage hereinafter mentioned, it, the plaintiff, had an interest in the said property to the amount of the sum in said policy set out and by defendant insured thereon, and to the amount of all the insurance on the said property; and the plaintiff further avers that on the day of, 19.., on section (Describe the real estate) in the county of and state of, on which said section said property was situated, the said property was destroyed by fire, whereby the plaintiff then and there sustained loss and damage on the said property so insured, as aforesaid, to an amount much in excess of the sum mentioned in said policy, and in excess of all of the insurance on the said property, which said fire and loss and damage did not happen by means of any invasion, insurrection, riot, civil war or commotion, or military or usurped power, or by order of any civil authority.

And the plaintiff further avers that forthwith, after the happening of said loss, to wit, on the day of, 19.., it gave notice thereof to the said defendant, and subsequently, to wit, on the day of, 19.., and within days from the date of said fire, the plaintiff delivered to the defendant as particular an account of said loss and damage as the nature of the case would admit, and in accordance with the terms and requirements of the said policy relating to notice and proofs of loss; and the plaintiff here avers that the defendant, both before and after the furnishing and delivery of said proofs of loss, denied that it was in any wise liable, on said policy, for any part or portion of the loss or damage so sustained by the plaintiff as aforesaid.

The plaintiff further avers that neither at the time of the making and delivery of the said policy, nor at any time afterward, was there any other insurance on said property except that which was provided for, permitted or required in and by the said policy; and that at the time of the said fire, the plaintiff held other policies of insurance, on said property, as follows: (Give number, expiration, the name of the company and amounts of each policy).

In addition to the above insurance, issued through the agency of, at,, there was other insurance to the amount of dollars placed with and bound by said agency, but the plaintiff is not now able to give the names of the companies nor the amount of the respective policies covering said sum of dollars.

The plaintiff further avers that it has kept and performed

all things in the said policy contained, on its part to be kept and performed, and that it has sustained loss and damage by said fire on said property, in the manner and to the amount aforesaid; nevertheless, the defendant, though often thereto requested, has not yet paid to the plaintiff that amount, or any part thereof, but refuses so to do, to the damage, etc.

1011 Stock in trade and furniture, Narr. (Mich.)

For that whereas, on the day of, 19.., and for a long time prior thereto, the defendant, the of, a corporation, was engaged in writing fire insurance risks and conducted a general fire insurance business in the state of Michigan.

That the said defendant had an agency which was conducted in its behalf by and, in the city of, in the state of Michigan.

That the said, of, a corporation, as aforesaid, on the day of, 19.., undertook to insure for said, of the city of, state of Michigan, who is plaintiff herein, the saloon and restaurant furniture, fixtures and appurtenances, and stock in trade at the plaintiff's place of business, situated on the westerly side of street, being number, known as the, in the city of and state of Michigan.

And thereupon the said defendant, the, on the day of, 19.., issued a certain fire insurance policy, to wit, policy No., and delivered the same to the said, plaintiff herein, whereby the said defendant, the, in consideration of the sum of dollars, to it paid by the said plaintiff, did insure the said against any loss or damage by fire to the extent of dollars on the above named property, more fully described as the saloon and restaurant furniture, furnishings and fixtures, beer pumps, electric motor, gas engine, belting, shafting, electric dynamo, electric switchboard, carbonating machine and all appliances, pipes and fixtures used in connection therewith, electric light fixtures, lamps and fixtures, bars and bar furniture, stoves and ranges, mirrors, pictures, books, tables, chairs, iron safe, glass-ware, china-ware, silver-ware, plated-ware, ice-chest, partition, portieres, rugs, sideboards, signs and awnings in and outside of the building, hot water urn, piano, cash register, nickle-in-the-slot machines, ornaments, kitchen furniture, and fixtures in the toilet rooms, and all such other fixtures, utensils and furnishings as were used by the assured in connection with his saloon and restaurant.

Also his stock in trade, consisting principally of liquors, wines, beers, whiskies, cigars, tobacco, mineral water, provi-

sions and restaurant supplies, all of which were contained in the two-story brick store building and additions thereto situated on the westerly side of street at No., and known as the, in the city of, state of Michigan.

And the said defendant, in consideration of (\$.....) dollars to it paid by the said plaintiff, in the said policy of insurance, undertook and promised to make good to the said plaintiff, any loss by fire not exceeding the sum of (\$.....) dollars as should happen to said property above described, from the day of, 19.., at noon, to the day of, 19.., at noon, the amount of such loss to be paid sixty (60) days after due notice, ascertainment and satisfactory proof of the loss according to the terms and conditions of said policy, which said premium of (\$....) dollars was duly paid in full by the said to the of, prior to the day of, 19...

That on, to wit, the day of, 19.., the said policy of insurance being then in full force, the plaintiff being in possession of the said property hereinbefore described, and insured by the said defendant, being the said restaurant, fixtures, appurtenances, and stock in trade, described more fully in this declaration and situated at No. street, in the city of, state of Michigan, the plaintiff suffered damage by fire of, to wit, (\$.....) dollars, from which loss as sustained, the said defendant in its insurance policy, to wit, No., agreed to hold the said plaintiff harmless to the extent of (\$.....) dollars, and thereupon the said within sixty (60) days after the said fire, gave the said defendant notice in writing of the said fire and the amount of the loss thereby sustained by the said plaintiff, as ascertained; and proof of same was duly made in accordance with the provisions of the said policy, to wit, No., as required by the said defendant: that more than sixty (60) days have elapsed since the ascertainment and proof of loss as aforesaid.

Plaintiff avers that with the consent of the said defendant, he carried concurrent insurance of (\$.....) dollars.

That by reason of the premises, the defendant, the, of, on, to wit, the day of, 19.., at, to wit, the city of, county of, state of Michigan, became and was indebted to the plaintiff,, in, to wit, the sum of (\$.....) dollars and interest, according to the terms of its said contract, and in consideration thereof, then and there promised to pay to the said plaintiff the proportional amount of said loss, to wit, the sum of (\$.....) dollars and interest thereon; nevertheless the said defendant neglected

to pay the said plaintiff as aforesaid although often requested so to do. (Add common counts)

1012 Stock of goods or merchandise, Narr. (Mich.)

For that whereas, the said defendant on the day of, 19.., by its policy of insurance numbered, same being a Michigan standard policy issued at its, Michigan, agency and countersigned by, agent, did insure said plaintiff against loss or damage by fire and lightning in the sum of dollars upon his stock of and all other goods, wares and merchandise kept for sale by the assured while located in the one story, iron clad building and its additions situate on lot of the village of, Michigan, which said policy of insurance commenced, 19.., and expired, 19... That said plaintiff paid a premium of dollars for said insurance.

That afterwards, on to wit,, 19.., while said policy was in full force and effect, said plaintiff suffered a loss by fire which destroyed and damaged the property covered by said, and insured against loss and damage by fire and lightning by said policy of insurance, and being the property of said plaintiff, said loss and damage being in the sum of, to wit, dollars. That said plaintiff furnished proper proofs of loss to said defendant. That said defendant's proportion of said loss and damage which it should have paid to this plaintiff was, to wit, the sum of dollars, according to the terms of its said policy of insurance, and under and by virtue of its promises therein made.

Yet, etc.

b

For that whereas, the said defendant heretofore to wit, on the day of, 19.., at the village of, in said state of Michigan, on application of said, made and delivered a certain policy of insurance in writing and bearing date the said day of, 19.., whereby said defendant, in consideration of the sum of dollars (\$.....), in premium, in hand paid by the said plaintiff to the said defendant, or its duly authorized agent, the receipt whereof was thereby acknowledged, did insure the said plaintiff, the said, against loss or damage by fire to the amount of dollars, as follows, to wit, dollars on his stock of merchandise, consisting principally of, and all other goods, wares and merchandise not more hazardous kept for sale by the assured not specified in the foregoing, while contained in the frame, shingle-roof building and adjoining and connecting additions thereto while occupied as a

and dwelling, and situated on the of block, north side of street, Michigan; dollars on furniture and fixtures while contained in said building, including the iron safe and cash register; and dollars on his household and kitchen furniture, useful and ornamental, beds, bedding, linen, family wearing apparel, plated ware, printed books, (mirrors, pictures, paintings, engraving and their frames, jewelry in use, value claimed not to exceed cost), crockery, glass and china-ware, pianoforte, sewing machine, fuel and family stores, all contained in said building.

And said defendant, for the consideration aforesaid, did in and by the said policy, promise and agree to make good and satisfy unto the said, all such loss or damage, not exceeding in amount the sum of dollars, as should happen by fire to the property therein and herein above specified, on the day of, 19.. at noon to and until the day of, 19.., at noon, the said loss and damage to be estimated according to the true and actual value of the property at the time such loss or damage should happen, and to be paid within sixty days after notice and proof thereof; and which said policy of insurance so delivered by said defendant to said plaintiff was destroyed by fire at the time of the loss by fire of said property above described at the time hereinafter mentioned.

The said plaintiff avers that at the time of the making of the said policy of insurance, as aforesaid, and from thence until the loss and damage hereinafter mentioned, he had an interest in the said insured premises and property to a large amount, to wit, to the amount of all the money by him insured thereon, and that afterwards, to wit, on the day of, 19.., the said personal property, goods and chattels above mentioned, being the said insured property, the property in said policy of insurance mentioned, were burned, consumed and destroyed by fire, which did not happen or take place by means of any invasion, insurrection, riot, or civil commotion, or of any military or usurp power; whereby the plaintiff sustained damage to a large amount, to wit, the amount of money thereon assured.

And the said plaintiff further avers that by the terms of said policy of insurance above mentioned, other concurrent insurance of said insured property was permitted, and that the property in said policy mentioned, at the time of said fire, (was not insured in any other office or company than defendant's), except as permitted by said defendant's policy of insurance; but that it was insured, as permitted by said policy of insurance, for the sum of dollars in the company,, of, at the time of said fire; (that said insured property was not insured at the time of the mak-

ing of said defendant's policy in any other office or company than the defendant's.)

The said plaintiff further avers that the said building, in the said policy mentioned, was not at any time after the making thereof, and during the continuation thereof, appropriated, applied or used to or for the purpose of carrying on or exercising therein any trade, business or vocation denominated hazardous or extra hazardous, or specified in special rates required by said defendant, or for the purpose of storing therein any of the articles, goods or merchandise in the said rates denominated as hazardous or extra-hazardous, and mentioned in the memoranda of special rates unless otherwise specially provided for in said policy.

And the plaintiff further avers that he forthwith, after the said loss, gave notice thereof to defendant, and as soon thereafter as possible, to wit, on the day of, 19.., by mail from the city of, in said state of Michigan, to the said defendant in the city of, in the state of Illinois, and by it then and there duly received particular account of his loss and damage as the nature of the case would admit, signed by the plaintiff and by him sworn to; that said account was in all respects just and true, and showing in said account the value of the property insured, and in what manner the building of which the same was contained was occupied at the time of loss, the name of the person having charge thereof and residing therein, and when and how the said fire originated, so far as the affiant knew or believed, and his interest in the property insured at the time of the loss and damage aforesaid; that annexed to the said account then and there delivered was a certificate under the hand and seal of a notary public unconcerned in said loss, therein stating that he had examined the circumstances attending such fire, and loss and damage alleged and that he verily believed that the said insured had honestly sustained loss and damage on the said insured property to the amount claimed in said affidavit, the same being at least the sum of dollars.

The said plaintiff further avers, that although he has in all things observed, performed and fulfilled all and singular the matters and things which on his part were to be observed, performed and fulfilled according to the form and effect of the policy of insurance, and although he has sustained loss and damage on occasion of said fire to a large amount, to wit, the amount of dollars, as aforesaid, yet the defendant has not paid to the plaintiff the said sum of money, so by the defendant assured, as aforesaid, and by the plaintiff lost, as aforesaid, or repaired or reimbursed for said loss sustained by said fire, aforesaid, although often request so to do, or any part thereof, and the said loss, and every part thereof still remains wholly unpaid and in arrear, contrary to the form and effect

of said policy of insurance, and to the damage of said plaintiff in the sum of dollars; and therefore he brings suit, etc.

(Virginia)

For this, to wit, that, heretofore, to wit, on the day of, 19.., the said defendant caused to be made a certain policy of assurance in writing, purporting thereby and containing therein, that in consideration of the sum of dollars and cents, to it paid by the said plaintiffs, the receipt whereof the said defendant thereby acknowledged, and the agreement on the part of the said plaintiffs to pay all assessments, which might equitably and ratably be levied upon them by the said defendant, the said defendant undertook and promised the said plaintiffs that it, the said defendant, would insure according to the provisions and plans of hazardous risks, known as class in the said defendant association, the said plaintiffs, against loss or damage by fire or lightning, to the amount of dollars, and would make good unto the said plaintiffs any such loss or damage as should happen by fire, not exceeding the said last named amount of dollars, for the term of years from the day of, 19.., at noon, until the day of, 19.., at noon, on certain premises, the property of the said plaintiffs, in the said policy described as "Merchandise in frame store, \$..... situated at, county, Virginia;" the said loss or damage to be estimated according to the actual cash value of the said property at the time the same shall happen, and to be paid by the said defendant within sixty days after due notice and proof thereof, made by the said plaintiffs in conformity to the conditions of the said policy, and the amount to be paid should have been determined upon, unless the said defendant should have given notice of its intention to repair or replace the damaged property; and in the said policy sundry provisos, conditions, prohibitions and stipulations were and are contained and thereto annexed as by the original policy, which is filed herewith, will more fully and at large appear.

And the said plaintiffs say that before and at the time of making the said policy of assurance by the said defendant, and continuously from that time until the day of, 19.., the said plaintiffs were interested in the insured property, in said policy mentioned, and described as aforesaid, to a large amount, to wit, the amount of dollars, but that on the aforesaid day of, 19.., the said, one of the plaintiffs, and a partner in the aforesaid firm of, which was composed of the said and, sold his interest in the prop-

erty mentioned and described in the policy aforesaid, and consisting of one stock of general merchandise, located at, in county, Virginia, and delivered the aforesaid policy of insurance to the said, the remaining partner in the said firm of, who at that time became the sole owner of the aforesaid property, and has been the sole owner, and in sole possession thereof, continuously, since, and is now; and the said stock of merchandise, in the said policy mentioned, and located at in county, Virginia, afterwards and between the day of, 19.., at o'clock noon, and the day of, 19.., at o'clock noon, to wit, on the day of, 19.., was burned up, and consumed and destroyed by fire, and damage and loss was thereby occasioned to the said plaintiffs, to the amount of dollars, in such manner, and under such circumstances as to come within the stipulation, promise and undertaking aforesaid of the said defendant in the said policy contained, and to render liable and oblige the said defendant to insure the said plaintiffs against loss or damage by fire, to the amount of dollars, and to make good to the said plaintiffs any such loss or damage as should happen by fire, not exceeding the said last mentioned sum of dollars on the property aforesaid, in the said policy described, and thereby intended to be insured; of which said burning and destruction by fire and of the loss and damage aforesaid thereby occasioned to the said plaintiffs, to wit, to the amount of dollars, due notice and proof was afterwards, to wit, on the day of, 19.., made by the plaintiff to the said defendant, and was received at the office of the said defendant in conformity to the conditions of the said policy. And the said plaintiffs further say that they have performed, fulfilled, observed and complied with each and all of the conditions, provisos and stipulations of the said policy on his part and behalf to be performed, fulfilled, observed and complied with, and has violated none of its prohibitions, according to the form and effect, true intent and meaning of the said policy.

Yet, the said plaintiffs say that although sixty days have elapsed since due notice and proof as aforesaid was made to the said defendant, as aforesaid, of the said burning and destruction by fire, and of the loss and damage, aforesaid, thereby occasioned to the said plaintiffs, the said defendant has not paid nor made good to the said plaintiffs the said loss and damage of dollars, or any part thereof, but the same and every part thereof are wholly unpaid and unsatisfied to them, contrary to the force and effect of the said policy.

Wherefore the said plaintiffs say that the said defendant, although often requested, hath not kept with the said plaintiffs the agreement aforesaid, contained in the said policy, made

between it and the said plaintiffs, in that behalf as aforesaid, but that the said defendant hath broken the same, and to keep the same with the said plaintiffs hath hitherto wholly refused, and still doth refuse, to the damage of the said plaintiffs dollars, which said sum of money in damages is the relief here prayed for.

And therefore they institute this action of trespass on the case in assumpsit.

1013 Forfeiture of contract, wrongful, Narr. (Ill.)

For that whereas, heretofore, to wit, on the day of, 1...., at, to wit, the county aforesaid, the defendant was a corporation organized and existing under and by virtue of the laws of the state of, and as such was engaged in the work of channeling or excavating a certain drainage canal in said state of, and thereupon and on said first mentioned date entered into a certain contract or agreement with the plaintiff for the channeling or excavating of that certain portion of said drainage canal known as, to wit, section, which said contract or agreement was in writing and was in words and figures as follows, to wit: (Insert copy of proposal, contract, specifications and bond).

And the plaintiff alleges that after the execution of said contract hereinbefore mentioned between the parties hereto he, the plaintiff, entered upon the performance of the said contract and was carefully performing and complying with each and every requirement imposed upon him by the terms and conditions of said contract until thereafter, and on the day of, 19..., when the said defendant, by its officers and agents, wrongfully, improperly and erroneously, as hereinafter set forth, declared the said contract forfeited and thereby prevented the plaintiff from carrying on the work contemplated by said contract, and has ever since kept and prevented the plaintiff from performing and carrying on said work.

And the plaintiff further alleges that the pretended forfeiture of said contract by the defendant was improper, erroneous and false, and that the said defendant had no authority to declare the same for the reason that the plaintiff was complying in all things with the requirements imposed upon him by the said contract, but that the defendant, by its officers and agents in its behalf, based said pretended forfeiture of said contract upon a false and erroneous estimate of the amount of work and excavation to be done and made by said plaintiff under said contract, in that it demanded and required by said estimate that the plaintiff should excavate a quantity of rock, glacial drift, earth and

other material which exceeded the requirements of said contract in the sum of, to wit, per cent; and said defendant, by its officers and agents, further based said pretended forfeiture of said contract upon a false, improper and wrongful method of computing the rate of progress which was to be made by plaintiff in performing the work under said contract, in this, that the said defendant ascertained the rate of progress which should be made by plaintiff by dividing the total amount of money which was to be paid the plaintiff for the work to be performed under said contract by the total amount of months in the period in which said work was to be performed, although, as the plaintiff alleges, the only true and proper method of estimating the said rate of progress under this contract was to determine the time needful for the execution of the several independent parts of the work in a proper and economical manner, that is to say, the number of months of work, and to divide said number of months so ascertained by the number of months allotted for the doing of the whole work. And the defendant, by its officers and agents, further based said pretended forfeiture upon its decision that the plaintiff was required to commence the said work upon the day of, 19.., although, as the plaintiff alleges, the true and only proper date to be taken as the date of commencing said work under the terms of said contract was the day of, 19.., whereby, and by means of the premises, the plaintiff alleges the said defendant wrongfully and improperly declared said contract forfeited, and wrongfully and improperly kept and prevented the plaintiff from completing said work under the terms and conditions of said contract.

And the plaintiff further alleges that he claims damages for the reason that he was obliged to and did lay out and expend large sums of money in the preparation and prosecution of such work, and otherwise in and about the doing of what was necessary and proper to be done under said contract, and for the loss of great gains and profits which he would have received and made except for such wrongful forfeiture and breach of contract by defendant as aforesaid, that is to say, that he had the means and ability to perform, and was performing, the work demanded of him by said contract, and was thereby able and was making a good profit out of said work, to wit, a profit of, to wit, cents on each cubic yard of glacial drift so excavated and removed by him, and a profit of, to wit, cents on each cubic yard of solid rock so excavated and removed by him, and a profit of, to wit, cents on each cubic yard of dry rubble masonry so built by him.

And so the plaintiff alleges by means of the premises aforesaid he has been deprived by the defendant of great gains and profits, amounting to a large sum of money, to wit,

dollars, which he otherwise might and would have made had he been permitted by the defendant to complete and perform the terms and conditions imposed upon him by said contract. (To the damage, etc.)

1014 Gaming, action

Assumpsit lies under the Gaming act of Illinois to recover money, goods, or other valuable things, lost, paid, or delivered to the winner or winners at gaming.⁵⁸

1015 Grain transfer contract, Narr. (Ill.)

For that whereas, heretofore, to wit, on the day of, 19.., the said plaintiff and the said defendant, for a valuable consideration, entered into a certain contract in writing in the words and figures following: (Insert contract *in hac verba*.)

And said plaintiff further avers that on, to wit, the day of,, the said plaintiff assigned all his interest in said contract unto the firm of R, which said firm was composed of said plaintiff A B, and of one M, which said assignment was ratified and confirmed by said defendant.

And plaintiff further avers that in consideration of the promises in said contract contained on behalf of said defendant, said firm of R, to wit, on the day of,, with the consent and authority of said defendant, commenced to erect and build a Grain Transfer House and Hopper Scales, and all the machinery pertaining thereto, as provided for in said agreement, on the land described in said agreement, to wit, in said county, for the purpose of handling, weighing and transferring in bulk all the grain, mill feed and seeds which should be transferred from the cars of western and other connecting railroad lines, to wit, at county aforesaid, to the cars used by said defendant for transportation of such grain, mill feed and seeds over its railway to points east of in said county, as provided in said agreement with said railway company, which said Transfer House and Hopper Scales, with all attachments and machinery adequate for the purpose of weighing and transferring all grain, mill feed and seeds which could or should be presented for transfer by said defendant, were completed, to wit, on the of,, and said R, by reason of the consideration and promises aforesaid on the part of said defendant, and with the consent, authority and ratification of said defendant, did thereupon enter upon the business of trans-

⁵⁸ See, 132, c. 38, Hurd's Statute 1909.

ferring all such grain, mill feed and seeds from car to car, and weighing the same, as provided for in said agreement.

And said plaintiff further avers that said R, could not conveniently transfer mill feed through its said Transfer House, and the right to have such transfer of such mill feed and the weighing thereof was waived by said defendant.

And plaintiff further avers that said R, to wit, on the day of,, entered upon the performance of the duties so imposed upon it by said contract, with the consent and authority of said defendant, and weighed and transferred all the grain and seeds presented to it at such transfer house to be transferred and weighed, and so continued to weigh and transfer all such grain and seeds, until, to wit, the day of,, and kept and performed all its promises and obligations, and the promises and obligations of said plaintiff individually under said contract.

And plaintiff further avers that although said firm of R, kept and performed all things in said agreement contained on its part or on the part of said plaintiff to be kept and performed, nevertheless, the said defendant, though often thereto requested, has not kept and performed its said promises on its behalf to be kept and performed.

And said plaintiff avers that on, to wit,,, the said defendant, to wit, at county aforesaid, abandoned the said contract on its part to be performed, and neglected and refused to perform the same, and also refused, without any reasonable or just cause, to be bound by the same.

And said plaintiff avers that after the abandonment of said contract and refusal to perform the same by said defendant, he, the said M, departed this life, on, to wit,, 19...

And said plaintiff further avers that said and the said plaintiff have always been ready and willing and have offered the defendant to continue in the said service and employment of defendant in weighing and transferring said grain and seeds as aforesaid as provided in said contract, and to perform all the duties required by him or it to be performed according to the terms of said contract.

And the plaintiff further avers that the weights so obtained by it in weighing and transferring such grain and seeds contracted for to be transferred through said Transfer House as aforesaid, are and were of the value of to wit, per car. And he avers that the number of cars annually transferred on the track to the cars of said defendant company amount, to wit, (\$.....) dollars.

And he further avers that, to wit, (.....) cars per annum of grain and seeds will continue to be transferred on said track to the cars of said defendant for and dur-

ing the period of time provided in said contract, viz., up to, to wit,,

And the plaintiff further avers that the saving to said defendant company in the switching, weighing and transfer of such grain and seeds in said agreement referred to through the methods and devices of said second party, as set out in said contract over and above the actual cost of doing the same work under the ways and methods used by said first party at the time of said contract amounts annually to the sum of, to wit, (\$.....) dollars.

And the plaintiff further avers that he and the firm of R were obliged to, and did lay out and expend large sums of money for work, labor and material necessary to build and equip said Transfer House, according to the terms of said contract; and that said Transfer House was valuable solely for the purposes contemplated by said contract of transferring grain and seeds from car to car, and that in consequence of said abandonment and refusal of said defendant company to be bound by the terms of its contract, said Transfer House has become of no value to the plaintiff and the plaintiff says that he has thereby suffered damage to the extent of (\$.....) dollars.

And the plaintiff further avers that there is now due to him from said defendant company, on account of such non-performance of said contract by it, a large sum of money, to wit, the sum of (\$.....) dollars, being the amount of damage to and amount due said plaintiff by reason of the breach of said contract from the date of said defendant's wrongful refusal to perform said contract on its part to be performed, as aforesaid.

And the plaintiff further avers that he claims special damages for loss of profits, which the firm of R, or he as survivor, would have received, except for such breach of contract, from the receivers and shippers of grain and seed at; and he avers that said R or he as its representative, had a contract with the receivers and shippers of grain and seed at for the purchase of the weights of grain and seed, which said firm, or he as receiver obtained or would have obtained in transferring grain and seed from the cars of western railways having their eastern termini at, to the cars of said defendant railway company, to wit, at county aforesaid. And he avers that except for the breach of said contract by said defendant, said firm, or he as survivor, would have received large profits, to wit, per car, from such receivers and shippers of grain and seed at for the weights, to wit, of the cars of grain and seed transferred, or which would have been transferred by such firm, or by plaintiff as survivor from the cars of said western railways to the cars of said defendant company, to wit, the

weights of cars per annum, during the unexpired term of said contract, to wit, for years.

And plaintiff further avers that he claims special damages for loss of profits which the firm of R, or he as survivor otherwise would have received, except for such breach of contract, from western railways having their eastern termini at, and he avers that at the time when said contract was entered into between him, the said A B, and the said defendant company, it was known to said defendant, or its chief executive officers, that he, said A B, contemplated as a source of profit the sale of his weights so obtained or to be obtained to such western railways, and said plaintiff avers that except for the breach of said contract of said defendant, said R, or he as survivor would have received large profits, to wit, per car from such western railways, for the weights, to wit, of all cars of grain and seed transferred or which would have been transferred by said firm, or by said plaintiff as survivor, from the cars of such western railways to the cars of said defendant railway company, to wit, the weights of per annum, during the unexpired term of said contract, to wit, for years.

And the plaintiff further avers that although he and the said firm of R have kept and performed all things in the said contract contained on his or its part to be kept and performed, nevertheless the defendant railway company, though often requested, has not performed said contract, and refuses so to do, to the damage, etc.

1016 Guaranty of account, Narr. (Miss.)

That on and before day of, 19.., the said defendant was engaged in the private banking business in of, in the state of, under the name and style of the bank of That on and before the day and date aforesaid, there appeared and was on the books of account of said bank of a certain account or statement of debits and credits against one who had theretofore been doing business with the said bank of which said account, or statement of debits and credits, on the day and date aforesaid, to wit, the day of, 19.., showed that the said was indebted to the said bank of in the total sum of dollars, with interest thereon at the rate of per cent per annum from and after the day of, 19.. A true and correct copy of which said statement of account between the said bank of and the said is hereto attached, marked exhibit "A" and made a part of this declaration.

That on the day and date aforesaid, to wit, the

day of, 19.., the said for and in consideration of the sum of dollars to him then and there paid, did sell, assign, and transfer unto the plaintiffs and one jointly all of the assets of every kind and description belonging to the said bank of including the account against as aforesaid, and then and there turned over and delivered to plaintiffs and the said all the books, accounts, and choses in action, of said bank of including the account herein in controversy. A true and correct copy of which assignment and transfer is hereto attached, marked exhibit "B" and made a part of this declaration.

That by virtue of said assignment and transfer of the books, assets and choses in action of said bank of to plaintiffs and the said, the said defendant did then and there on, to wit, the day of, 19.., impliedly warrant the plaintiffs and the said that the account here in controversy, marked exhibit "A," was a valid subsisting obligation in his favor against the said to the extent showing thereby, to wit, the sum of dollars, with interest thereon at the rate of per cent per annum from and after the day of, 19..

That subsequently, on, to wit, the day of, 19.., the said did, for a valuable consideration to him in hand then paid, assign, set over and transfer unto the plaintiffs in this action, his entire interest in and to the assets of the said bank of including the account here in controversy. A copy of which said transfer is hereunto attached, marked exhibit "C" and hereby made a part of this declaration. That thereafter, to wit, on day of, 19.., the plaintiffs herein instituted a certain suit against the said on the account aforesaid, in the court of county, having then and there jurisdiction to determine said controversy. A copy of the declaration or petition in such case is hereto attached marked exhibit "D" and made a part hereof.

That thereafter, on, to wit, the day of, 19.., the said defendant filed his certain plea or answer to said declaration, denying thereby any liability to plaintiffs on account of the same suit in the declaration or petition aforesaid, a copy of which said plea or answer is hereto attached marked exhibit "E" and made a part of this declaration.

That plaintiffs notified the defendant of the pendency of the said suit and that the same was being contested by the said

That thereafter said court of county, having tried the issue joined between

plaintiffs and said, then and there having jurisdiction so to do, rendered a judgment for the defendant, in and by which said judgment it was determined and adjudged that the said claim was not a valid subsisting claim against the said, a true and correct copy of which said judgment is hereto attached and marked exhibit "F" and made a part of this declaration.

Wherefore plaintiffs in this action say that on,, to wit, the day of, 19.., the said claim or account of said bank of against the said, which was then and there assigned and transferred by the said defendant as aforesaid, was not a valid subsisting claim against the said, to the amount shown thereon, or to any part, as determined and adjudged by the said court of county., and that the said defendant's implied warranty has been breached, to the damage, etc.

1017 Guaranty of contract, Narr. (Ill.)

For that whereas, on, to wit, in consideration that the plaintiff would make for the to wit, pictures at the price of, to wit, and would deliver to the said pictures at a certain time thereafter, to wit, on or before, the said promised to accept of it, the plaintiff, said pictures when the same should be so made and delivered and to pay it the said price for the said pictures in two promissory notes of said each for the sum of, payable on and endorsed by the defendant by the name and the defendant at the time for the making of said contract, in writing guaranteed the faithful performance and fulfillment of the said contract by the in consideration of the promise of the plaintiff to make said pictures for said which said agreement between the plaintiff and said with the guarantee thereof by the defendant were in the words and figures as follows, to wit: (Insert copy of agreement and guarantee).

And the plaintiff avers that it did afterwards, to wit, on there made the said pictures for the and thereupon then and there was ready and willing and offered to deliver the same to it, and did deliver the same to the and requested it to accept and pay for the same as aforesaid. And the plaintiff avers that although it has in all respects complied with said contract and made said pictures in all respects in accordance with said contract and delivered the same within the time and at the place mentioned in said contract, yet neither the nor the defendant, did, nor would then or at any other time, pay the plaintiff for said pictures the price aforesaid, or any part thereof, or give or deliver to the plain-

tiff the aforesaid notes of the endorsed by the defendant as aforesaid, but to do so both the said and the defendant have hitherto refused and still do refuse, to the damage, etc.

1018 Guaranty of notes, Narr. (Ill.)

For that whereas on, to wit, the day of, 19.., the plaintiff by its salesman, made a proposition in writing to of in the state of, to furnish certain articles and machinery in said proposition mentioned, by the plaintiff to the said, which proposition is in the words and figures following, to wit: (Set out proposition).

And plaintiff avers that the said upon, to wit, the day of, 19.., accepted the said proposition, and thereupon on the day last aforesaid, in consideration that the plaintiff, at the request of the defendant, would approve the said proposition aforesaid and furnish the articles of machinery in the said proposition mentioned, and would in the manner and at the time in the said proposition mentioned, and would accept the said notes therefor executed in conformity with said proposition, the said defendant, by his agreement in writing then and there made, executed and delivered to the plaintiff, promised the plaintiff to stand responsible for the said notes so to be executed by the said, as they should mature, if the said should fail to make payments thereon at the time specified in said notes respectively, for payment; which said promise so made to the plaintiff, is in writing and is in the words and figures following, to wit: (Set out guaranty).

And the plaintiff avers that thereupon it, in consideration of the promise of the defendant, in his said writing contained, afterwards, to wit, on the day of, 19.., at its office in, in the state of, approved the said proposition, and thereupon, entered upon the performance of the contract so entered into by and between plaintiff and said

Plaintiff further avers that on or before, 19.. it furnished and shipped f. o. b. cars at to at, Michigan. (Describe the machinery that was shipped); that the common carrier refused to ship said articles so loaded at, as aforesaid, unless the freight thereon was prepaid; and that plaintiff thereupon prepaid the freight thereon, from to

Plaintiff further avers that the defendant, well knowing that the said articles so shipped from as aforesaid, had not been shipped on or before on by his instruction in writing, directed the shipment of said articles; that upon the arrival at, of the articles

so shipped from, as aforesaid, the defendant accepted said articles from the common carrier, and thereafter paid the plaintiff the freight so prepaid thereon.

Plaintiff further avers that all of said articles so furnished and shipped by it, as aforesaid, were constructed of good material and in a workmanlike manner and were so furnished in good shipping order.

And plaintiff avers that afterwards, to wit, on the day of, 19.., the said made, executed and delivered to plaintiff, his certain promissory notes, each bearing date and each for the sum of dollars, payable to the plaintiff at, and each bearing interest at the rate of per cent per annum, until paid, the first due in months after date, and second and third due, respectively, in months after date; which said notes, so executed as aforesaid, were submitted to the defendant, by the said and the defendant thereupon directed the signing and delivery thereof by the said to the plaintiff, copies of which notes are hereto attached.

Plaintiff further avers that although the date of maturity of the first of the said notes has long since elapsed, that the said has not paid nor caused the same to be paid, nor any part thereof, nor the interest thereon, nor any part thereof, whereof the defendant had notice; yet the defendant has not paid, nor caused the first of the said notes nor any part thereof, nor the interest thereon, nor any part thereon, to be paid to the plaintiff, but refuses so to do, to the damage of the plaintiff of dollars; and therefore it brings suit, etc.⁵⁹

1019 Guaranty of shares of stock, Narr. (Ill.)

For that whereas, a certain A P, on, to wit, the day of, 1...., at the city of, in the county of, and state of, made and entered into and delivered to the plaintiff a certain agreement in writing and under seal, in and by which said agreement, after reciting the sale to the plaintiff by said A P of shares of the capital stock of the company for dollars cash, it was provided that the purchase of said stock by said plaintiff and the sale thereof by said A P was made upon the condition that if at any time between days after the date of said agreement in writing, to wit,, 1...., and,

⁵⁹ Phoenix Mfg. Co. v. Bogardus,
231 Ill 528 (1907).

1...., the said plaintiff should need the said sum of dollars, and because of said need it should be imperative that he, the plaintiff, sell and dispose of said shares of stock, then the plaintiff therein and thereby agreed that before offering said stock to any other person whatsoever he would serve a sixty-day notice upon said A P, requesting him to take up all of said stock for exactly the same sum by him paid therefor, to wit, dollars, and in consideration of said sale therein made by said A P to the plaintiff, the said A P therein and thereby expressly agreed to accept said notice and to take up within said sixty days all of said shares of stock and repay to the plaintiff the said sum of, and the said defendant, in consideration thereof, by his certain agreement in writing, signed by him and sealed with his seal, did promise and agree to and with the said plaintiff that in the event that the sixty-day notice mentioned in said agreement with said A P was served upon said A P and the said A P failed to take up said stock in said agreement mentioned, then and in that case the said C D therein and thereby agreed and promised to take up said stock and pay the plaintiff therefor the sum of

And the plaintiff avers that afterward, to wit, the day of, 1...., he, the said plaintiff, was in need of said, and because of said need it was imperative that he sell and dispose of said shares of stock, and that before offering said shares of stock to any other person whatsoever he, the said plaintiff, served a sixty-day notice upon the said A P in accordance with the terms of said agreement, requesting him, the said A P, to take up said shares of stock for exactly the same sum paid by the plaintiff therefor, to wit,, and requesting said A P to repay to said plaintiff the said sum of; that the said A P then and there accepted said notice by promising the plaintiff to take up all of said shares of stock and repay to said plaintiff the said sum of, within sixty days thereafter.

And the plaintiff further avers that at the time of said notice to said A P and the promise of said A P to take up said stock and repay the plaintiff said sum of, as aforesaid, and ever since that time, the said plaintiff was, and he now is, ready, able and willing to give up and surrender the certificate for the shares of stock hereinbefore mentioned to the said A P or the said defendant whenever either the said A P or said defendant should take up said stock and repay the plaintiff therefor the said sum of; that at the expiration of said sixty days the plaintiff requested the said A P to take up said shares of stock and repay to him the said sum of according to the terms of said agreement; but the said A P did not then or at any other time before or afterward pay the plaintiff the said sum of dollars, and

did not then or at any other time take up said shares of capital stock, or any portion thereof. Thereupon the plaintiff requested the said defendant to take up the said shares of stock and pay to the plaintiff the said sum of according to the said agreement in writing of said defendant; yet the said defendant has not taken up said shares of stock and paid the plaintiff said, but refuses so to do, to the damage, etc.⁶⁰

1020 Heirs and devisees; declaration, requisites

In a creditors' action against heirs or devisees brought under the statute, without joining the personal representative, the declaration must set forth the facts which authorize the bringing of the suit,⁶¹ that the personal property which belongs to the estate is insufficient to discharge the just demands against it, that certain real estate descended to the heirs,⁶² and either that judgment had been obtained against the personal representative and that there were no assets in his hands to satisfy it according to statute, or, that the estate was not administered upon within one year from the death of the testator or intestate as is required by statute.⁶³ The common counts in assumpsit are insufficient to sustain an action against heirs or devisees.⁶⁴

1021 Indemnity bond as salesman, Narr. (Ill.)

For that whereas, heretofore, to wit, on and before, 19.., and from thence hitherto, the plaintiff was and is carrying on and conducting a wholesale grocery business in the city of, county of, and state of, and in the operation, conduct, and management of its business, employed salesmen to solicit sales of its goods, and merchandise; and that, on, to wit, the day of, 19.., at, to wit, the city of in, to wit, the county of, and state of, aforesaid, one D, was employed by the plaintiff as traveling salesman for the plaintiff and otherwise, and in consideration of such employment, and of the sum of dollars (\$.....) to the defendants in hand paid, the said defendants on, to wit, the day of, 19.., at said county and state, made, executed, and delivered to the

⁶⁰ Wolf v. Powers, 241 Ill. 9 (1909).

⁶¹ Ryan v. Jones, 15 Ill. 1, 6 (1853); McLean v. McBean, 74 Ill. 134, 137 (1874).

⁶² Guy v. Gericks, 85 Ill. 428, 430, 431 (1877).

⁶³ Hoffman v. Wilding, 85 Ill. 453, 456 (1877); Sec. 12, c. 59, Rev. Stat. (Ill.).

⁶⁴ McLean v. McBean, 74 Ill. 134, 137.

plaintiff.. their written obligation, substantially in words and figures as follows: (Insert personal service bond); which bond was then and there, on, to wit, the day of, 19.., at the city of, in the said county and state, executed and delivered to and accepted by the said plaintiff. In consideration whereof, and relying upon the said bond aforesaid, the plaintiff did then and there, on, to wit, the day of, 19.., employ the said D as its traveling salesman, and otherwise, as aforesaid, and said D continued and remained in the employ of the said plaintiff until, to wit, the day of, 19...

And the plaintiff avers that after the making and delivery of said writing obligatory, as aforesaid, and before the said day of, 19.., and while the said D was still so in the employment of the plaintiff aforesaid, the said D became indebted to the plaintiff in a large sum of money, to wit, in the sum of, to wit, dollars (\$.....), for moneys advanced by plaintiff to said D, and in a like amount for goods, wares and merchandise by the plaintiff sold and delivered to said D, and in a like sum for attorneys' fees incurred and paid by plaintiff, and in a like sum for interest on divers sums of money during that time furnished by the plaintiff to said D, all of which said D has neglected to pay, although often requested; by means whereof, and by reason whereof, the defendants became liable to pay the plaintiff, whenever thereunto demanded, the sum of, to wit,, dollars (\$.....); and being so liable, then and there at, to wit, the county aforesaid, promised to pay the plaintiff whenever so requested the said sum of, to wit, dollars (\$.....); yet, etc.

1022 Indemnity bond to sheriff, Narr. (Ill.)

For that whereas in the year, said, was sheriff of the county of, in the then territory of, and was performing the duties pertaining to his said office, and at the term co-partners doing business as defendants herein, sued out of the district court of the judicial district of the county of in the said territory of, a certain writ of the people called a writ of attachment, by which said writ the said, sheriff as aforesaid, was commanded to attach so much of the estate, real or personal, of co-partners doing business as to be found in said county as should be of value sufficient to satisfy said writ; and that afterwards, by virtue of said writ, said, sheriff as aforesaid, then and there seized certain goods and chattels of the said for the purpose of satisfying the claim of said

And plaintiff further avers that after the attachment of said goods by the said, sheriff as aforesaid, under said writ of attachment in said suit of against one claimed to have the right of possession of said property so levied on as aforesaid, by virtue of a certain chattel mortgage made, executed and delivered by said to said, dated, upon and covering said property taken by said sheriff as aforesaid, to secure the sum of dollars; and that said made a demand upon said, sheriff as aforesaid, to deliver to him, the said said goods so levied upon by said, sheriff as aforesaid, as the goods of, but said being instructed by the defendants, not to deliver said goods to the said the said defendants, by the name of at the request of said and according to the statute in such case made and provided, to protect the said from all damages, costs, expense and trouble of any nature whatsoever which he might incur by the holding of said goods so levied on in said case of against after the demand so made by said for said goods, executed and delivered to said a certain indemnifying undertaking as follows: (Insert copy of bond.)

In and by means of which writing the defendants then and there faithfully promised, undertook and agreed that they, the said defendants, would at all times and forever thereafter keep said harmless and indemnified of, for and against said claim of said and all costs, charges, trouble and expense of any nature whatsoever, to which he might be put by reason of such levy and sale, or either; and the said confiding in said promise and undertaking of the defendants, refused to deliver said goods and chattels so attached by him the said sheriff as aforesaid, under and by virtue of said writ of attachment issued out of said district court of the judicial district of the county of, in the territory of, at the suit of said to the said, but retained the same in his, the said possession; and thereafter certain proceedings were had in said district court aforesaid, whereby the attachment of said against the said was sustained, and the said goods so levied upon by said sheriff as aforesaid, in said suit to satisfy the said claim of, were sold under the order of said district court of the judicial district of county, in said territory of and the sum dollars was realized by said sheriff as aforesaid for said goods.

And that thereafter in the district court of the judicial district of the county of, in the territory

of, said commenced an action against said for the conversion of the said goods so taken and seized by said on the writ of attachment issued in said suit of against by the seizing of said goods under said writ of attachment in said action of against and by the holding of said goods after demand was made on said sheriff as aforesaid, by said for the possession of said goods; and that the value of the goods in controversy in said action of against was the value of said goods seized by said, sheriff as aforesaid under and by virtue of said writ of attachment issued in said case of against, which were the goods for the taking and holding possession of which by the said, sheriff as aforesaid, the said in and by their said bond hereinbefore set forth undertook and agreed to hold the said, sheriff as aforesaid, harmless and indemnified.

And that thereafter such proceedings were had in said suit of against that a judgment was rendered in said district court of the judicial district of the county of, in said territory of, in said action of said against said in favor of said and against said for the sum of, with legal interest thereon since the day of and costs and disbursements; and in order to satisfy said judgment and pay his attorney's fees and other necessary and unavoidable expenses in said suit incurred by him, the said was compelled to pay out and expend, and did pay out and expend a large sum of money, to wit,

That at the time of the occurrences hereinbefore described, there was in force in the territory of a statute in the words and figures as follows, to wit: (Insert copy of statute). That said statute remained in full force and effect thereafter until the territory of was admitted as one of the states of the United States, when the following statute went into force: (Insert copy of statute).

Nevertheless, the said defendants not regarding their said promises, undertakings and agreements, though often requested so to do, have not yet repaid to the said or to the plaintiff, the administrator of the estate of said, said sum of \$. or any part thereof, nor have they in any manner indemnified the said or the plaintiff, the administrator of the estate of said on account of having paid the same, but have hitherto wholly neglected and refused to pay the same, and still do so neglect and refuse

to do, to the damage of the plaintiff of the sum of \$., for which he brings his suit, etc.⁶⁵

1023 Insurance, contract, ambiguity

Ambiguous or doubtful provisions of an insurance contract are interpreted against the insurer, but this does not authorize a perversion of language for the purpose of creating an ambiguity where none exists.⁶⁶

1024 Insurance, form of action

Since the statutory provision abolishing common law distinctions between sealed and unsealed instruments as controlling the form of action, an action of assumpsit is appropriate on a sealed policy of insurance.⁶⁷

1025 Insurance, parties

The surviving beneficiary may bring an action upon an insurance certificate without joining the administrator of the decedent.⁶⁸ A benefit certificate that has been made payable to "children," does not include children of deceased children, or grandchildren, for in Illinois, the beneficiary has no vested right or interest in the contract between the member and the benefit society, and the statute of Descent is inapplicable.⁶⁹

1026 Insurance; declaration, requisites, proof

In declaring upon an insurance policy, all precedent acts or conditions should be set out and performance should be averred, either in terms or in substance showing a right of recovery, omitting all conditions subsequent to the right of recovery and all acts to be done by the insurer.⁷⁰ An allegation that the plaintiff has performed all of the conditions, etc., refers to conditions which have not been waived.⁷¹ The averments of performance in a declaration may be general, under Florida practice.⁷² A requirement in Michigan that a declaration on

⁶⁵ Meyer v. Purcell, 214 Ill. 62 (1905).

⁶⁶ Crosse v. Knights of Honor, 254 Ill. 80, 85, 86 (1912).

⁶⁷ Rockford Ins. Co. v. Nelson, 65 Ill. 415, 424 (1872).

⁶⁸ Jones v. Knights of Honor, 236 Ill. 113, 117 (1908).

⁶⁹ Martin v. Modern Woodmen, 253 Ill. 400, 403 (1912).

⁷⁰ Rockford Ins. Co. v. Nelson, 65 Ill. 418; Tillis v. Liverpool & London & Globe Ins. Co., 46 Fla. 278.

⁷¹ Levy v. Peabody Ins. Co., 10 W. Va. 560, 565 (1877).

⁷² Tillis v. Liverpool & London & Globe Ins. Co., *supra*.

an insurance policy need not set forth the policy *in haec verba* does not dispense with the necessity of proving such policy.⁷³

1027 Instalments

Any number of instalments due upon an instrument may be declared for in one and the same count.⁷⁴

1028 Interest, foreign laws, Narr. (Ill.)

And whereas, also, the said defendant, to wit, on the first day of, was indebted to the said plaintiff in the further sum of, to wit, dollars lawful money of the United States for interest upon and for the forbearance of divers other sums of money before that time, and then due and owing from the said defendant to the said plaintiff, for, to wit, interest on the sum of, to wit, and dollars, the amount due from said defendant to said plaintiff for cattle sold and delivered by said plaintiff to said defendant, on and before to wit, under and in accordance with said contract in said count mentioned and set out—said interest being due at the rate of per cent per annum from to wit,, under and by virtue of the law and statute of the state of, in force upon said day of, and from thence hitherto,—said law and statute to be found in, to wit, section of chapter, of the compiled statutes of enacted at the regular session of the legislative assembly of, which said law and statute of the state of, is in the following words, to wit: (Insert pertinent section).

And being so indebted to the said plaintiff, the said defendant in consideration thereof, afterwards, to wit, on the same day and year, and at the place aforesaid, undertook and then and there faithfully promised the said plaintiff well and truly to pay unto the said plaintiff the sum of money last mentioned when the said defendant should be thereunto afterwards requested. Nevertheless, etc.⁷⁵

1029 Judgment; merger of judgment debtor, Narr. (Mich.)

For that whereas, hereofore, to wit, on the day of, 19.., the circuit court of the United States for the district of, at a regular term of said court holding at the city of,

⁷³ Morley v. Liverpool & London & Globe Ins. Co. 85 Mich. 210, 217 (1891).

⁷⁴ Consolidated Coal Co. v. Peers, 150 Ill. 344, 349 (1894); Godfrey

v. Buckmaster, 1 Seam. 447, 450, 451 (1838).

⁷⁵ Morris v. Wibaux, 159 Ill. 627 (1896).

in the state of, in a certain cause therein pending wherein the plaintiff herein was plaintiff, and the said J, a corporation organized under the laws of the state of Michigan, was defendant, awarded to the plaintiff a final judgment against the said J in the sum of, to wit, dollars damages, being the amount then and there adjudged to be due to the plaintiff in said action on account of the non-performance of certain undertakings of the said J, as well as the further sum of, to wit, dollars and cents for the costs and charges of the said plaintiff by him about his suit in that behalf expended, as by the records and proceedings thereof remaining in said court more fully appears, which said judgment still remains in full force and effect and has not been reversed, satisfied or otherwise vacated.*

And the plaintiff avers that, before the rendition of said judgment, but after the cause of action upon which the same was based had accrued to the plaintiff, to wit, on the day of, 19.., said J, W, and certain other corporations unknown to the plaintiff, all of which were organized under the laws of the state of Michigan, became and were merged, consolidated and amalgamated into a certain other corporation organized under the laws of the state of Michigan, to wit, C.

And the plaintiff avers that afterwards, to wit, on the day of, 19.., said C became and was merged, consolidated and amalgamated with and into the defendant herein, M.

And the plaintiff avers that said C was in law and in fact a consolidation, merger and amalgamation of the said J and W and other corporations unknown to the plaintiff, and that the defendant herein is in law and in fact a consolidation, merger and amalgamation with said C; and the plaintiff avers that since the respective consolidations, mergers and amalgamations, said J and said C have wholly ceased to do or transact any business, that neither of said corporations have any property, assets or franchises of any kind or description and are wholly insolvent and without property or assets of any description with which to pay and discharge their respective debts and obligations. That all of said property, assets and franchises of both of said corporations are now owned, possessed, used and occupied by the defendant herein by virtue of said several and respective mergers, consolidations and amalgamations as aforesaid.

2. (Consider first count to star as here repeated the same as if copied in words and figures.)

And the plaintiff avers that before the rendition of said judgment, but after the cause of action upon which the same was based, had accrued to the plaintiff, to wit, on the day of, 19.., said J, by certain mesne

conveyances assigned and transferred to the said C, all of its property, assets and franchises of every kind and description. That the only consideration for said assignment and transfer aforesaid was the issue and delivery to bondholders of said J, of the said bonds of said C, in exchange for and in substitution of the bonds of said J, and also the issuance and delivery to the stockholders of said J, of the stock of said C, in exchange for and to take the place of the stock held by said stockholders in said J; and that no other or further consideration was paid by said C, to or received by the said J.

And the plaintiff further avers that, afterwards, to wit, on the day of, 19.., the said C, assigned and transferred all of its property, assets and franchises of every kind and description, including the property so received by it as aforesaid from the said J to M, the defendant herein. That no other or further consideration was paid by said defendant to said C than the issuance and delivery to the bondholders of the said C bonds of said defendant in exchange and to take the place of the bonds of said C, and of the issue and delivery of stock of said defendant to the stockholders of said C in exchange and to take the place of the stock held by the stockholders in the said C.

And the plaintiff further avers that since the said several transfers and assignments as aforesaid the said J and the said C have wholly ceased to do or to transact any business and that neither of said corporations have any property, assets or franchises of any kind or description, but are wholly insolvent and without any means whatever with which to pay and discharge their respective debts and obligations. That all of said property, assets and franchises of both of said corporations, to wit, J and C, are now owned, possessed, used and occupied by the defendant herein by virtue of said several assignments and transfers aforesaid, and for no other or additional consideration than the exchange of said stocks and bonds aforesaid.

3. (Consider first count to star, as here repeated, the same as if copied in words and figures.)

And the plaintiff avers that before the rendition of said judgments, but after the cause of action upon which the same was based had accrued to the plaintiff, to wit, on the day of, 19.., the said J transferred and assigned to C all of its property, assets and franchises of every kind and description, and that in consideration of said transfer and assignment said C promised and agreed to and with said J that it, said C, would pay and discharge all claims, demands, judgments and causes of action of every kind and description then or thereafter arising or owing by the said J, and particularly said C promised and agreed to and with said J and the plaintiff herein that, in consideration of said

assignment and transfer, it, said C, would pay and discharge the claim and judgment of the plaintiff hereinbefore mentioned. That no other consideration was made or given by the said C for such assignment and transfer aforesaid except the promise and agreement aforesaid.

And the plaintiff further avers that, afterwards, to wit, on the day of, 19.., the said C assigned and transferred all of its property, assets and franchises of every kind and description to the defendant herein, M. That, in consideration of said assignment and transfer as aforesaid of all property, assets and franchises of said C to the defendant herein, the said defendant promised and agreed to and with the said C and the plaintiff herein that it would pay and discharge all claims, demands, judgments and causes of action of every kind and description owned by the said C, and particularly did the said defendant herein promise and agree with the said C and the plaintiff herein that it would pay and discharge the claim and judgment of the plaintiff hereinbefore mentioned in consideration of the assignment and transfer as aforesaid.

And the plaintiff further avers that since said several assignments and transfers as aforesaid said J and C have ceased to transact any business and that neither of said corporations have any property, assets or franchises of any kind or description with which to pay and discharge their respective debts and obligations. That they are wholly insolvent and without means of any description whatever; that all of said property, assets and franchises of both of said corporations are now owned, possessed, used and occupied by the defendant herein by virtue of said several assignments and transfers as aforesaid; and that no other or further consideration was paid by the defendant herein.

By means whereof, the said defendant became and was indebted to the plaintiff upon said judgment, and being so indebted, the said defendant afterwards, to wit, on the day of, 19.., in consideration of the premises, promised the plaintiff to pay him the said several sums of money hereinbefore mentioned when it, the said defendant, should be thereunto afterwards requested. Nevertheless, etc.

1030 Lease, Narr. (Ill.)

For that whereas, heretofore, to wit, on the day of, 19.., at, county of, and state of, the said plaintiff, by name and style of, demised to the said defendants by the several names of and, a certain messuage and premises with the tenements and appurtenances thereunto belonging, situate in the city of

....., county and state aforesaid, being the floor, known and designated as the floor of the apartment building, numbers avenue, to have and to hold the same to the said defendants for a certain term, to wit, for and during the term from the day of, 19.., to the day of, 19.., they yielding and paying therefor, during the said term to the said plaintiff, the rent of dollars, that is to say, on the first day of each and every month during said term, the sum of dollars by even and equal portions; by virtue of which said demise, said defendants entered into possession of said property with the appurtenances and became and were possessed thereof from, to wit, the said day of, 19..; that the said demise is still in full force and effect; and that a large sum of money, to wit, the sum of dollars of the rent aforesaid for the space of months, ending, to wit, on the day of, 19.., became and was due and payable from the said defendants to the said plaintiff, and still is in arrears, and unpaid to the said plaintiff, to wit, at, in the county of, and state aforesaid. By reason whereof, and by force of the statute in such case made and provided, said defendants became liable to pay to said plaintiff the said sum of money, rent as aforesaid, in the said lease specified according to the tenor and effect of the said lease; and being so liable, said defendants, in consideration thereof, afterwards, to wit, on the same day and year last aforesaid, and at the place last aforesaid, undertook and then and there faithfully promised said plaintiff well and truly to pay unto said plaintiff said sum of money, rent as aforesaid, in the said lease specified, according to the tenor and effect of said lease. Yet, etc.

b

For that whereas, to wit, on the first day of, 19.., by a certain lease in writing then and there made between the plaintiff of the one part, and O, a corporation, etc., of the other part, the plaintiff demised and leased unto said O, and to its successors and assigns, the following described premises, to wit (Describe property), which said premises were to be occupied for a saloon, beer garden and dwelling, and for no other purpose; and in and by said lease said O was to have and to hold the said premises to itself and its successors and assigns from the day of, 19.., to the day of, 19.., yielding and paying to the plaintiff therefor the sum of (\$.....) dollars in monthly instalments of (\$.....) dollars in advance upon the first day of each and every month of said term, at the office of the plaintiff in And said

O, for itself and for its assigns, did thereby then and there covenant and promise with the plaintiff, his heirs, representatives and assigns, that it would well and truly pay or cause to be paid to the plaintiff, his heirs, representatives and assigns, the said rental in monthly instalments of dollars each in advance, in accordance with the conditions of said lease; and said O further covenanted, promised and agreed with the plaintiff that it would pay its portion of the water taxes levied or assessed against the said premises during the term of said lease; a copy of which lease, with the endorsements and assignments thereof, is hereto attached, marked exhibit "A," and made a part hereof.

And the plaintiff avers that afterwards, and on, to wit, the day of, 19.., said O did, for a valuable consideration, duly sell, assign, transfer and set over in writing all of its right, title and interest in and to said lease to A, the defendant herein, and to its successors and assigns, in consideration of said assignment by said O to the defendant, and of the consent to such assignment by the plaintiff, in writing, which assignment and consent were duly accepted by the said defendant, said defendant entered into the possession and complete control of the said demised premises as of its own property, in accordance with the terms and conditions of the said lease hereinbefore referred to; and by means whereof the defendant did covenant, promise and agree to and with the plaintiff to keep and perform any and all of the covenants, terms and conditions in the said lease contained, and did also further promise, covenant and agree to pay, or cause to be paid to the plaintiffs or to his heirs, representatives and assigns, the several sums of money that might become due and payable under the terms and conditions of said lease, and in accordance with the agreements therein contained, upon the day or days therein named. By reason thereof, the said defendant thereby bound itself, its successors and assigns, to keep and perform any and all of said covenants, terms and conditions in said lease contained.

And in consideration of the said assignment of said lease by said O to the defendant, the consent to such assignment by the plaintiff, the acceptance of said lease and the assignment thereof, as aforesaid, by the defendant on, to wit, the day and year last aforesaid, the defendant became and was possessed of the said premises, to the same extent and under the same terms and conditions as those possessed by said O, prior to the time of said assignment; that in pursuance of such assignment and the acceptance thereof, as aforesaid, and on, to wit, the day and year last aforesaid, the defendant entered into the possession of and control over the said demised premises in the said lease specified as of its own premises, and the said defendant continued to use, occupy and enjoy the said premises and the rents, issues and profits thereof, from, to wit, said last named day,

without interruption or hindrance thereof on the part of the plaintiff or of his representatives or assigns until the full termination of the term of said lease and until, to wit, the day of, 19...

Yet, the plaintiff avers, that after the making and execution of the said assignment of the said lease, as aforesaid, by said O to the said defendant, and with the consent of the plaintiff, as aforesaid, the said defendant, wholly neglecting and refusing to keep and perform the terms and conditions of said lease, did not pay or cause to be paid to the plaintiff a large sum of money justly due to the plaintiff by the terms and conditions of said lease, so that on, to wit, the day of, 19.., the defendant was in arrears for rent justly due the plaintiff from it, as aforesaid, in the sum of (\$.....) dollars, being the instalments of rent due for the period of months, commencing on the day of 19.., and ending on the day of, 19..; that said sum of money is still due and unpaid to the plaintiff, contrary to the tenor and effect of the said lease and of the assignment thereof to the defendant, and of the acceptance of such assignment in the manner aforesaid. And so the plaintiff avers that the defendant has not kept and performed its covenants and agreements in the said lease contained, as required by the assignment thereof and the acceptance of such assignment in the manner aforesaid, but on the contrary thereof, the defendant has broken its several covenants, promises and agreement, so made as aforesaid. (Add count for use and occupation and common assumpsit counts.)

LIFE INSURANCE

1031 Warranties and representations

An applicant's answers to questions in an application for life insurance, which have been honestly and truly made, which are not material to the risk, which have not been intended by the parties to be regarded as warranties, and which relate to matter of opinion or judgment concerning which there might be a mistaken but honest belief, will be considered as mere representations, and as not barring a recovery, if such a construction may reasonably be given to the insurance contract, notwithstanding a provision in the contract that the questions and answers are to be deemed warranties. But such answers will be deemed material, whether they are so or not, when they are expressly warranted to be true, and will prevent a recovery under the contract, where they are shown to be false, although in-

nocently made.⁷⁶ The question whether any specified relatives or blood relatives of the proposed insured had been afflicted with either of certain enumerated diseases, or with any other disease not mentioned that is hereditary, is material to a life insurance risk.⁷⁷ "How long since were you attended by a physician or professionally consulted one?" means how long it had been since the applicant had last consulted a physician or had been treated by one, and does not relate to a matter of opinion or judgment concerning which there might be a mistaken but honest belief, and an answer to the question is material to the risk.⁷⁸

1032 Accident, Narr. (Ill.)

For that whereas on, to wit, the day of, 19.., at the place hereinbefore stated, to wit, at the county of, and state of, the defendant,, made a certain policy of insurance and delivered the same to, who was then and there the son of the plaintiff herein, and thereby said defendant then and there, for the consideration therein expressed, promised the plaintiff in the terms of said policy of insurance and the agreements and conditions thereto annexed, which said policy of insurance and agreements and conditions are in the words and figures, following, to wit: (Set out policy *in haec verba*).

And plaintiff alleges that the representations made by the said in the application for said policy of insurance were true in all respects in substance and in fact, and that he paid the regular premium as required by the terms of said policy and all moneys due from him to said defendant according to the terms of said policy, and did all things on his part to be performed.

And the plaintiff further alleges that she is the mother of the said, and is named in the said policy of insurance as the beneficiary therein, and that the said, at the time of the issuing of said policy of insurance to him as aforesaid, was by occupation and employment a for a railroad contractor and resided in the town of, in the county of, in the state of And the plaintiff alleges that the said, up to the time of his death as hereinafter set forth, kept and performed each, all and every one of the conditions, obligations and requirements of the said policy of insurance.

⁷⁶ Crosse v. Knights of Honor, 254 Ill. 80, 84 (1912).

⁷⁸ Crosse v. Knights of Honor, 254 Ill. 83, 86.

⁷⁷ Enright v. Knights of Security, 253 Ill. 460, 462, 465 (1912).

And plaintiff further alleges that the said died on the day of, 19.., at the county of, in the state of, aforesaid, to wit, at (Here insert county where suit is brought) county. That his death was produced by bodily injuries received by or through external, violent and accidental means within the true intent and meaning of the aforesaid policy of insurance, to wit, by accidentally taking and drinking poison; and that such injuries alone occasioned the said death of the said within days from the happening thereof, to wit, on the same day of the happening thereof; and plaintiff further alleges that the said policy of insurance was not obtained by the said by or through the means of any misrepresentation, or concealment, or of any false, fraudulent or untrue statements of any nature, and that no attempt has been made by this plaintiff or by any other persons whomsoever, either by fraud or by the concealment, suppression or misrepresentation of any material fact or facts to obtain any money from the said defendant,, or by virtue of said policy of insurance.

And plaintiff further alleges that the said death of the said was not produced in consequence of disease existing prior or subsequent to the date of said policy of insurance; and that said death of was not a case of disappearance, nor suicide, sane or insane, nor accident, nor death, nor loss of limb or sight, nor disability resulting wholly or partly, directly or indirectly, from any one of the following causes, or while so engaged or affected: (Name the diseases and causes which the policy specifically fails to cover), within the time, intent and meaning of said policy.

And plaintiff further alleges that due and sufficient proofs of the death of the said through bodily injuries received by or through external, violent and accidental means as aforesaid, were presented to the said defendant insurance company within months after the death of the said, to wit,, 19.., in accordance with the requirements of said policy of insurance, but that the said defendant then refused, and still does refuse, and neglects to pay the amount so justly due and owing to this plaintiff upon the said policy of insurance as aforesaid. And plaintiff alleges that no part or portion of the amount agreed to be paid in and by said policy of insurance, to wit, the sum of dollars, has been paid to or received by her, but that the whole amount thereof is due and owing to her, to wit, the just and full sum of dollars.

And plaintiff further alleges that the said, from the time of the issuing to and the receipt by him of the said policy of insurance as aforesaid, and up to and at the time of said accident and of the death of the said therefrom, as aforesaid, the said continued to and

did reside in the said county of and state of, to wit, (Insert county of suit, although actual residence is different), county, and remained and continued in the business of for a railroad contractor, and was not during that time engaged in any other business, occupation or employment; and plaintiff avers that, as the mother of the said, and as the beneficiary named in said policy of insurance and person to whom the same was to be paid in the event of the death of the said, she has kept, done and performed all things by her to be kept, done and performed according to the terms of said policy of insurance, and that she is entitled to have and receive from the said defendant, the amount of said policy so agreed to be paid to her as aforesaid, to wit,; yet the said defendant, not regarding its said promise in that behalf, utterly broke and violated the same and refused to pay the same, or any part thereof, and though often requested to pay the same, has hitherto refused and neglected and still refuses so to do, to the damage, etc.⁷⁹

b

For that whereas, before and at the dates hereinafter mentioned, the said defendant was engaged in the business of insuring persons against accidental bodily injuries, including accidental death, in said county, and on, to wit, the day of, 19.., and in the lifetime of said J W, in consideration of the payment by him of the sum of (\$.....) dollars, did issue and deliver in said county to said J W a certain contract or accident insurance policy, number, duly signed by its president and secretary and general agent, a copy of which policy is attached to this declaration, marked exhibit "A," and made a part hereof, which said policy provided among other things substantially as follows: In consideration of the warranties set forth in said policy and of the sum of (\$.....) dollars, the C D insured and promised to insure said J W for the term of months from the day of, 19.., at noon, against bodily injuries effected through external, violent and accidental means, in the principal sum of (\$.....) dollars; that the said principal sum should be payable to the executors, administrators and assigns of the said J W in case of his death from such bodily injuries alone within ninety days from the time of receiving such injuries; and that in case such injuries were in consequence of the burning of a building in which the said J W should be at the commencement of the fire, the amount to be paid his executors, administrators or assigns should be double the said amount,

⁷⁹ Travelers' Ins. Co. v. Dunlap,
160 Ill. 642 (1896).

that is to say, should be the sum of (\$.....) dollars. That on, to wit, the day of, 19.., the said defendant, in consideration of the further sum of (\$.....) dollars, then paid to it in said county by said J W, issued to him a further contract or renewal receipt, duly signed by the proper agents of said defendant, a copy whereof is hereto attached, marked exhibit "B," and made a part hereof, whereby the said policy of insurance was renewed and continued for a further term of months, beginning on the day of, 19.., and running to the day of, 19.., at noon.

And the plaintiff further avers that subsequently, to wit, on the day of, 19.., and while said policy was in force as aforesaid, the said J W suffered injuries in the said county aforesaid through external, violent and accidental means and in consequence of the burning of a building in which the said J W was at the commencement of the fire, from the result of which injuries solely the said J W died within ninety days thereafter, on, to wit, the day of, 19.., in the county aforesaid.

And the plaintiff further avers that all the requirements and conditions of said policy to be kept or performed or necessary to happen in order to render the said defendant liable to pay the said amount of (\$.....) dollars to this plaintiff have been duly kept and performed and have happened, and that said policy was never assigned by said J W.

By reason of which premises aforesaid the defendant thereby became and was liable to pay to the plaintiff the said sum of (\$.....) dollars; yet, though often requested so to do, the said defendant has not paid the said sum, or any part thereof, to the plaintiff, but has wholly neglected and now wholly neglects and refuses so to do. (Add consolidated *indebitatus* counts)

c

For that whereas, heretofore, on, to wit, the day of, 19.., at, to wit, the city of, county and state aforesaid, the defendant, for and in consideration of the warranties endorsed on the policy of insurance hereinafter set forth, and of the payment of a premium of, to wit,, did make, execute and deliver to F, of the county and state aforesaid, its policy of insurance, which said policy and warranties endorsed thereon are in words and figures as follows, to wit: (Set forth policy and endorsements *in haec verba*). And plaintiffs further aver that they are the duly appointed and acting executors of the said F, deceased, whose estate was made the beneficiary under said policy of insurance.

Plaintiffs further aver that the premium of, to wit, (\$.....) dollars, in said policy mentioned, was paid

to the defendant by said F at the time of the execution and delivery of said policy of insurance; that thereafter, and on, to wit, the day of, 19.., the said F came to his death by bodily injuries sustained through external, violent and accidental means, to wit, by bullet wounds inflicted by certain persons, who, at the time said wounds were inflicted, assaulted said F for the sole purpose of robbery; that death resulted within ninety days from such injuries, independently of all other cases. (Aver administration)

Plaintiffs further aver that immediate written notice was given to the defendant, at, of the injuries from which the death of said F resulted, with full particulars thereof, and the full name and address of the assured; and that affirmative proof of the death of said assured was also furnished to the defendant within months from the time of death.

Plaintiffs further aver that by the execution and delivery of said policy of insurance, and the designation thereon of the estate of the said F as the beneficiary thereunder, and the death as aforesaid of the said F, the defendant became bound and obligated to pay to these plaintiffs a large sum of money, to wit, (\$.....) dollars; that plaintiffs have requested the defendant to pay them the said sum of money, but that the defendant has refused, and still refuses, so to do, and that the said sum of money remains wholly due and unpaid to the plaintiffs, to the damage of the plaintiffs of (\$.....); and therefore they bring their suit, etc.

1033 Benefit, agency

The person who takes an application of benefit insurance is the agent of the society, and knowledge to him is knowledge to his principal.⁸⁰

1034 Benefit; warranties, waiver

A benefit society waives its right to claim that certain answers shall constitute warranties, when false answers to an application are written down by the agent of the society. And this is not affected by a request in the benefit certificate, to which is attached a copy of the application containing the answers, to read the application and to inform the society if the answers are incorrect.⁸¹

⁸⁰ Johnson v. Royal Neighbors, 253 Ill. 570, 574 (1912).

⁸¹ Johnson v. Royal Neighbors, *supra*.

1035 Benefit; liability, law and fact

The application for the certificate, the physician's examination, the by-laws of the society and the certificate issued are all to be considered as the contract of fraternal benefit insurance, and their meaning and construction are questions of law.⁸²

1036 Benefit; liability, commencement, interest

A by-law of an insurance benefit society that its liability upon a benefit certificate shall not begin until its actual manual delivery to a member who is then in sound health protects the society from liability in consequence of disease contracted by a member subsequent to his application for membership and before delivery to him of the benefit certificate, as in the course of business a considerable space of time might elapse between the date of the application and the delivery of the benefit certificate.⁸³ A plaintiff who is entitled to recover upon a benefit insurance certificate is also entitled to interest.⁸⁴

1037 Benefit, beneficiary

The undertaking of a lodge or order is that it will pay the amount agreed upon to the person designated in the certificate if he is within the eligible class; and if he is not, that it will pay the benefit fund to some other person who is within the eligible class. The designation by a member of an ineligible person merely relieves the order of liability to pay to the person designated. The general obligation to pay to the proper person still exists and constitutes the cause of action. Hence, a count which bases the recovery of the plaintiff as beneficiary named in the benefit certificate, and a count which claims the right of recovery in behalf of a person who is not thus designated, do not necessarily state different causes of action.⁸⁵ Under a benefit certificate which has been issued in behalf of an ineligible and an eligible beneficiary, the entire fund goes to the eligible beneficiary.⁸⁶

⁸² *Enright v. Knights of Security*, 253 Ill. 462.

⁸³ *Johnson v. Royal Neighbors*, 253 Ill. 576.

⁸⁴ *Beresh v. Knights of Honor*, 255 Ill. 122, 128 (1912).

⁸⁵ *Beresh v. Knights of Honor*, 255 Ill. 127.

⁸⁶ *Cunat v. Ben Hur*, 249 Ill. 448, 449, 450 (1911).

1038 Benefit, Narr. (Ill.)

(Precede this by common consolidated counts)

For that whereas, on, to wit, the day of, 19.., the defendant made its policy of insurance wherein and whereby, for the consideration therein expressed, then and there paid to the said defendant by S, the receipt whereof was by the defendant then and there acknowledged in writing and endorsed on the said policy, the said defendant constituted said S a benefit member of said defendant association, and therein and thereby agreed to pay to the plaintiff the sum of \$....., subject to the conditions contained in said policy, in days after acceptance of satisfactory evidence to said association of the death of said member and proof of a valid claim; and the said defendant then and there, on, to wit, said day of, 19.., at, in the county aforesaid, delivered the said contract or policy of insurance to the said S, which contract or policy of insurance is hereto attached, marked exhibit "A," and made a part of this declaration.

And the plaintiff further avers that afterwards, to wit, on the day of, 19.., and while the said contract or policy of insurance was in full force and effect, the said S then and there died; and thereafter the plaintiff made and furnished to the defendant satisfactory evidence of the death of said S and proof of a valid claim of plaintiff under said contract or policy aforesaid, which said evidence of the death of said S and proof of said valid claim was in all respects in accordance with the terms and provisions of the said contract or policy of insurance; and the plaintiff avers that it then and there became and was the duty of the defendant to pay to the plaintiff the sum of \$....., in accordance with the terms of said contract or policy of insurance; nevertheless the defendant, though often thereunto requested, has not paid to the plaintiff the said amount, or any part thereof, but refuses so to do, to the damage of the plaintiff of \$....., and therefore she brings her suit.

b

For that whereas, on, to wit,, 19.., the defendant made its policy of insurance, called a benefit certificate, and delivered the same to S, the father of these plaintiffs, and who was then living, which policy or benefit certificate is in words and figures as follows: (Copy benefit certificate, with all endorsements).

That said S became a member of No., of, of the order of aforesaid, and became a contributor to its beneficiary fund, and fully complied with all the laws, rules and regulations of said order, and all the conditions in said certificate, and was in good stand-

ing in said order at the time of his death, which occurred on the day of, 19... That in accordance with its promises in said certificate, the said defendant has now become obligated to pay to these plaintiffs the sum of (\$.....) dollars out of its beneficiary fund; nevertheless the defendant, although duly notified of the death of said S, and often requested to make such payment to these plaintiffs, has not paid said amount, or any part thereof, and refuses so to do, to the damage, etc.

c

For that whereas, the defendant is and has been, at the time herein mentioned, and before and since, a corporation duly organized, existing and doing business under the laws of the state of Illinois, with its office in the city of, in said county, incorporated for the purpose of providing life insurance or death benefits to the beneficiaries of members of the police force of said city of, upon payment of certain assessments and compliance with certain requirements and conditions.

That on, to wit, the day of, 19.., plaintiff's intestate and husband,, was a member of the police force of the city of, on active duty and in good standing; that, on, to wit, the date aforesaid, in consideration of the sum of dollars by theretofore paid to said defendant association, and the further payment by him, to wit, of dollars upon the death of each member of said defendant association, as provided by its by-laws, and also his compliance with the constitution and by-laws of said defendant association, the said defendant association executed and delivered to the said its certain agreement in writing or certificate, numbered, in and by which, among other things, it agreed to pay, upon the death of said, within days after satisfactory evidence thereof, to the plaintiff, the wife of said, dollars.

The plaintiff further avers that she is the beneficiary named in said certificate at its date and has been the wife of said; that on, to wit, the day of, 19.., said suddenly and without explanation left and disappeared from his home,, and that he has been unaccountably absent ever since; that he has never returned or been heard of since said departure, although plaintiff has made diligent and continuous search for him; that said plaintiff has been and is wholly unable to find said, or to get any clue of him; that on, to wit,, said unheard of absence of said had continued seven years, and that at the end of said seven years said was presumed by law to be dead; that said departed this life on, to wit,; that on, to wit, the

..... day of, 19.., said plaintiff gave said defendant full, accurate, and specific notice in writing, verified by her oath, of said’s said disappearance, the date thereof, and his said continued and unheard of absence for more than seven years, ever since, and requested the defendant association to pay her, as said’s beneficiary, the said sum of dollars, named in said certificate;⁸⁷ that at the time of said’s death the defendant association consisted of more than members; that all dues and assessments under and in compliance with said certificate and defendants’ constitution and by-laws have been duly and reasonably paid by and on behalf of said up to and including the dues for the month of, amounting to dollars; that the said and the plaintiff, his beneficiary, have in all respects and things complied with the constitution, by-laws and said certificate, and did all things required of them to be done by the terms thereof; that at the time of said’s death, he was a member in good standing in said defendant association; and that by reason of the premises the plaintiff is entitled to be paid the said sum of dollars, with interest thereon at the rate of per cent per annum, from the day of, 19.., and also to recover the said sum of dollars and cents, the payment of, as an overpayment and unearned premium with like interest from its date. Nevertheless, etc.

d

For that whereas, heretofore, to wit, on the day of, 19.., at, in county, said defendant made its certain policy of insurance, sometimes called an individual accident insurance certificate, also called a certificate of membership, and delivered the same to F, then living, which said policy of insurance, sometimes called a certificate of membership, was and is in the words and figures following, that is to say: (Set out certificate).

That thereupon the said F was duly and properly admitted to membership in said association, and in consideration of said membership, representations and warranties made to it by the application for said membership and the sum of (\$.....) dollars, paid by the said F, and the further payment of other sums of money as they became due under calls of said defendant association, the said defendant association did promise and agree to and with the said F to pay or cause to be paid to the plaintiff within ninety days after satisfactory proof of

⁸⁷ Policemen’s Benevolent Ass’n.
v. Ryce, 213 Ill. 9, 19 (1904).

the death of the said F received at the office of said defendant association and approved by the directors of said association, the sum of (\$.....) dollars; and that it was provided and agreed by said F in said application for membership in the words following, to wit: (Set out agreement).

And the plaintiff avers that, on, to wit, the day of, 19.., the said insured, F, died from the effects of poison taken by him accidentally and in the place and stead of distilled water, which said F intended to take and believed he was taking at the time, and that he did not die from hernia, orchitis, fits, vertigo, somnambulism, nor of any bodily injury happening or disability resulting directly or indirectly in consequence of disease, or bodily infirmities, or of poison in any way taken, administered, absorbed or inhaled, within the meaning of said words as used in his said application for membership; nor did he die of any surgical operation or medical treatment; nor did the said F die from any injury which happened to him while under the influence of intoxicating drinks or narcotics, or in consequence of having been under the influence thereof; or while violating or in consequence of having violated the rules provided by any company or corporation or of the law of the state.

And the plaintiff further avers that all assessments or payments and calls due upon said membership certificate or policy of insurance due at and before the time of the death of the said F, were duly and properly paid to the defendant association, and that the said F kept and performed all things in the said policy of insurance or certificate of membership on his part to be kept or performed.

And the plaintiff further avers that the said defendant association, after the death of the said F, waived the furnishing by the plaintiff of any proof of the death of the said F.

And the plaintiff further avers that she, the plaintiff, has observed and kept all things in the said policy of insurance contained on her part to be kept and performed; yet, notwithstanding which, the defendant, although often requested so to do, has not kept and performed its said promises and undertakings in the said policy contained and by it to be kept and performed, and has not paid to the plaintiff the said sum of dollars, or any part thereof, and refuses so to do, to the damage, etc.

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For that whereas, on, to wit, the day of, 19.., in the city of and county of, said defendant made its certain certificate and delivered the same to B, then in life, but since deceased, at, to wit, the city of, on, to wit, the day aforesaid, and in consideration of the payment of an examination fee and all dues and assessments required by the by-laws of said defendant, and fur-

ther payment by B of the various sums required to be paid to said defendant, promised the said B, in the terms of the said certificate, and the conditions therein expressed and thereto annexed, which said certificate and conditions here follow in the words and figures following, to wit: (Set forth beneficiary's certificate).

And plaintiff avers that the said B departed this life at the city of and said county, on, to wit, the day of, 19... He further avers that the said B had complied with all and singular the terms and conditions of said certificate by it required to be performed, and fully complied with all the laws, rules and regulations of the said order which were at any time between the day of, 19..., and the day of, 19..., in force in said order, up to the time of his death; and plaintiff further avers that the said B was at the time of his said demise a member in good standing of said defendant order, and that the said defendant has had satisfactory evidence of the death of the said B, and that the said A, the beneficiary by the terms of the said certificate, through his legal representative, has, in all respects, complied with all the terms and conditions of said certificate upon him by it imposed; and the plaintiff further avers that no other certificate has been issued at the request of the said B but the one herein issued on; and the plaintiff brings said certificate into court here and offers to defendant the same in accordance with the laws of said defendant order; and plaintiff avers that the said A, being a minor son of the said B, is the same as the beneficiary A named in said certificate; that on the day of, 19..., the plaintiff was appointed by the court of county, conservator of the estate of the said B; and that plaintiff thereupon duly qualified as such conservator and entered upon the discharge of such duties, which will more fully appear from the record of said court; nevertheless, although the said beneficiary A and the plaintiff for him, has kept and performed all things in the said certificate on his part to be kept and performed, the defendant has not yet paid to the plaintiff the said sum of (\$.....) dollars or any part thereof, but refuses so to do, and there is now due and owing to the plaintiff as conservator of the said A from the defendant the sum of (\$.....) dollars, for which he brings suit, etc.

C, conservator of the estate of A,
Plaintiff.

By
his attorney.

1039 Employers' liability, Narr. (Ill.)

For that whereas, on the day of, 19..., in the city of and county and state of

....., said defendant made its policy of insurance or contract of indemnity, and delivered the same to said plaintiff, and thereby then and there, in consideration of dollars to it paid by the plaintiff, did agree to indemnify said plaintiff against loss from the liability imposed by law upon said plaintiff for damages on account of bodily injuries or death accidentally suffered by any employee or employees of said plaintiff while employed by said plaintiff in and about its factory or plant, located at, county,, excepting, however, certain employees therein named, in a certain condition, to wit, condition "A" of said policy, for a period one year from the day of, noon, to the day of, noon, as will more fully appear from the policy, which is ready to be produced in court, and which said policy of insurance, or contract of indemnity, was and is in the words and figures following, to wit: (Set forth policy).

And thereupon, to wit, on the day of, 19.., in consideration of the premises, said plaintiff, at the special instance and request of said defendant, then and there paid to said defendant, the sum of dollars, as a premium for the insurance and the indemnity aforesaid; and said defendant, by said policy of insurance, or contract of indemnity, did undertake and faithfully promise and agree to indemnify, make good and satisfy unto said plaintiff, all of such loss or damages as it might sustain, or be compelled to pay, not exceeding, however, the sum of dollars, for injuries to, or death of any one person covered by said policy of insurance, or contract of indemnity, on account of any accident which should happen during the period said policy of insurance, or contract of indemnity was in force, resulting in bodily injury or death of any such person so employed by said plaintiff in and about its said plant, and covered by said policy of insurance, or contract of indemnity.

And the plaintiff avers that, on, to wit, the day of, 19.., and while said policy of insurance or contract of indemnity was in full force and effect,, who was then employed by said plaintiff as a charger in and about its said plant, at, in the county of and state of, said being then and there one of the employees of said plaintiff, whose compensation was included in the estimate set forth in said schedule and policy of insurance, and not being of the employees or class of employees excepted from the liability of said policy of insurance, as provided in said condition "A" of said policy, sustained a bodily injury for which said plaintiff then and there became liable for damages under the law; that said sustained said injury while engaged in the work of said plaintiff in its said plant in the place and at the time last aforesaid.

And by reason of such injury so sustained, the said,

afterwards, to wit, on the day of, 19.., brought suit in the court of said county,, to the term, 19.., of said court, against the plaintiff herein, to recover damages for the injuries sustained by him as aforesaid. And said plaintiff avers that said defendant, well knowing that it had not been given written notice by said plaintiff of such injury, and claim for damages of said against the plaintiff herein, as provided in and by condition "B" of said policy of insurance or contract of indemnity; and well knowing that after the said suit was brought against said plaintiff by said to enforce said claim for damages by reason of such accident and injuries resulting therefrom, so received by him, and arising from a liability covered by said policy of insurance or contract of indemnity, that said plaintiff had neglected and failed to forward to the home office of said defendant every summons and process as soon as the same was served upon the plaintiff, as provided in and by condition "C" of said policy; with full knowledge of the above facts, and of the failure on the part of said plaintiff to give the written notice of the said injury to said, as provided in and by said condition of said policy of insurance, and with full knowledge of the fact that the plaintiff herein had failed to forward every summons or process as soon as the same was served upon said plaintiff to the home office of said defendant, as provided in and by said condition of said policy of insurance, the said defendant wholly waived such notices and said provisions of said policy of insurance and contract of indemnity, and began a negotiation for a settlement, and assumed and took upon itself the management, control and defense of said suit, and appeared in said court, in said cause, in the name and for and on behalf of the plaintiff herein; that by reason of said defendant having waived the giving of the notice as provided in said condition of said policy of insurance, and assuming and undertaking the defense of said suit, said plaintiff was prohibited in and by condition "D" of said policy of insurance, from interfering in any negotiations for a settlement, or legal proceedings in said cause; that, on, to wit, the day of, 19.., the same being one of the judicial days of the term, 19.., of said court, after a trial of the issues, a final judgment was rendered in said suit against the plaintiff herein and in favor of said, on account of said injuries, so sustained by him as aforesaid, for the sum of dollars and costs of said suit.

And said plaintiff further avers that afterward, on, to wit, the day of 19.., said defendant waiving and ignoring said conditions in said policy and the notice required in and by said conditions, further appeared in said court in said cause in the name of the plaintiff herein, under and by virtue of the provisions in said policy of insur-

ance or contract of indemnity, then and there excepted to the judgment so rendered by said court, and prayed an appeal from the judgment of said court, to the appellate court, in and for the district of the state of Illinois, which said appeal was by said court allowed and granted, upon the plaintiff herein giving an appeal bond in the sum of dollars, to be filed with and approved by the clerk of said court, within days and presenting a bill of exceptions within days after the rendition of such judgment. And afterwards, on, to wit, the day of, 19.., and within days after the rendition of said final judgment, said plaintiff, at the special instance and request of the defendant herein, and pursuant to, and in accordance with said order granting said appeal, caused to be filed in the office of the clerk of said court, an appeal bond in said cause, in the penal sum of dollars, which said bond was approved by the clerk of said court and then and there became the appeal bond required by said order of court. All of which said proceedings and doings in said cause will more fully appear from the records and files in said cause now remaining on file in the office of the clerk of said court, reference being had thereto for greater certainty.

And said plaintiff avers that under the conditions of said policy of insurance, or contract of indemnity, it became and was the duty of said defendant, after it had waived said notice provided in said policy, and assumed and took upon itself the defense of said suit, and after said plaintiff had been barred from appearing in said suit, under the conditions of said contract, by reason of said defendant having waived such notice, and assumed and undertook the defense of said suit, either to pay said judgment, or to prosecute and perfect said appeal in said appellate court and to indemnify and save the plaintiff from paying said judgment. Yet, the said defendant, not regarding its duty in that behalf, failed, neglected and wilfully refused to pay said judgment, or prosecute and perfect said appeal. And afterwards, to wit, at the term, 19.., of said appellate court, on motion of said, said appeal was dismissed by said court, and judgment rendered against the plaintiff herein, and in favor of said for the amount of said judgment, to wit, dollars, together with 5 per cent damages, and cost of suit.

And afterwards, to wit, on the day of, 19.., said commenced a suit in the court of said county, to the term, 19.., against the plaintiff herein, on said appeal bond, to recover said judgment, damages and costs, and on the day of, 19.., the same being one of the judicial days of said term of court, final judgment was entered in said suit, against the plaintiff herein, and in favor of said,

for the amount of said judgment, damages and costs, amounting to, to wit, dollars and cents; and thereupon the said caused an execution to be issued out of said court, directed to the sheriff of said county, commanding him that of the goods, chattels, lands and tenements of the plaintiff herein, he make the amount of said judgment and cost.

And afterwards, on to wit, the day of, 19.., the plaintiff herein satisfied said judgment and execution, by payment to said sheriff of the full amount of said judgment and cost; all of which will more fully appear from the records and files in said cause, now remaining in the office of the clerk of said court.

And said plaintiff further says, that although it has in all things conformed itself to and kept and observed all and singular the said acts, stipulations, conditions, matters and things, which on its part were to be observed and performed according to the form and effect of said policy of insurance, or contract of indemnity, and all the conditions thereto annexed, except the giving of the written notice of said injury according to said condition "B" of said policy, and the forwarding of every summons or process, as soon as the same was served upon it, as provided in and by condition "C" of said policy; and although it has sustained loss from the liability imposed by law upon said plaintiff for damages on account of bodily injury accidentally sustained while said policy of insurance, or contract of indemnity, was in force, by the said, who was then and there an employee of the plaintiff, covered by said policy of insurance, and not of either kind or class of employees mentioned in condition "A" of said policy who were excepted from the liability thereunder, and who sustained said injury at the time and in the manner aforesaid while employed in the said factory or plant of said plaintiff; and although said defendant waived the giving of the written notice of such injury, as provided by condition "B" of said policy, and the forwarding of every summons or other process in said cause as soon as the same was served upon said plaintiff, and began a negotiation for a settlement, and assumed and took upon itself the responsibility, control, management and defense of said suit, under said policy, well knowing that it had not been notified of said injury, and of the pendency of said suit, according to the terms thereof, and waiving all irregularities in the giving of such notice and compliance by said plaintiff with the conditions of said policy of insurance aforesaid; and although said plaintiff sustained damages in the manner, and to the amount aforesaid; yet, said defendant, though often requested, has not paid to said plaintiff, the said sum of money, or any part thereof, but has refused and still refuses so to do, to the damage of said plaintiff of dollars, and therefore it brings this suit.

1040 Endowment, Narr. (Md.)

For that on the day of, 19.., defendant was a corporation of the state of, duly incorporated under the laws of said state and doing business and authorized to do business as such corporation in the state of, and with authority under its charter to utter and issue insurance upon the lives of persons residing and being in the state of, and that on the said day of, 19.., in consideration of the payment of the annual premium of dollars made by a certain, of county,, paid defendant, and of the application of the said for a policy of insurance and the undertaking by the said to pay a like amount of dollars upon each day of,, thereafter until full years' premiums shall have been paid, or until the prior death of said, the said defendant made and executed its policy of insurance in writing, number of the following effect, viz.:, in consideration of the annual premium of dollars (the receipt of which was thereby acknowledged), and the payment of a like amount upon each day of and thereafter until full years' premiums shall have been paid, or until the prior death of the insured, the, of, promised to pay at the home office of the company in the city of, to, wife of, of county, of state, of therein called the insured, on the day of, if the insured be then living, or upon receipt at said home office of due proof of the prior death of the insured, to his said wife,, the beneficiary, with the right of revocation, dollars, less any indebtedness thereon to the company and any unpaid portion of the premium of the then current policy year, upon the surrender of the policy properly receipted; and said plaintiff avers that said defendant thereby insured the life of the said in the said sum of dollars, payable to said plaintiff, his wife, upon the death of the said, during the continuance of the said policy and before the day of, upon receipt at the home office of said company of due proof of the death of the insured.

And said plaintiff avers that on or about the day of, the said died (and his death was not caused by any of the causes exempted in said policy); and thereafter in due time as required by said policy, due proof of the death of the insured was made, delivered to and accepted by the home office in, by the plaintiff, the beneficiary named in the policy of insurance (no revocation and

no change of beneficiary having been made therein), in accordance with the requirements of the said policy of insurance; and that the said during his lifetime paid all the premiums and made all of the payments required by said policy and fully complied with all the stipulations and obligations on his part therein required of him by the terms of said policy; whereby said plaintiff avers that under said policy, undertaking and writing aforesaid, said defendant then and there became liable to pay to her the said sum of dollars, as specified in said policy of insurance, and that she did fully perform every stipulation, requirement and thing required of her by the said policy as the beneficiary therein to entitle her to recover from said defendant the said sum of dollars; but the defendant, wholly unmindful of its duty in the premises and its obligation under said writing, refused to pay, and has not paid to said the said sum of dollars, or any part thereof, or any interest thereon, although the plaintiff has made frequent demands upon said defendant to pay the same; and therefore the plaintiff brings this suit and claims dollars.

(Virginia)

For this, to wit, that heretofore, to wit, on the day of, 19.., the said defendant caused to be made a certain policy of insurance in writing purporting thereby and containing therein, that in consideration of the quarter annual premium of \$....., receipt of which the defendant acknowledged, and the payment of a like amount upon the day of, and thereafter, until twenty full premiums should have been paid, or until the prior death of the insured, the said defendant undertook and promised, the insured, under said policy that it, the said defendant, would pay to the plaintiff,, the sum of \$..... upon due proof of the prior death of said, the insured, who was then and there alive, provided the said should continue to pay the said quarterly premiums as they fell due as hereinabove set out and in said policy contained, and to the same annexed were and are sundry other provisos, conditions, prohibitions and stipulations, as by the original policy aforesaid, which is filed herewith, will more fully and at large appear.

And the said plaintiff says that after the making of said policy as aforesaid, by the defendant, to wit, on the day of, 19.., the said died, whereof afterwards, to wit, on the day of, 19.., due and sufficient proof was made to the said defendant, in conformity to the terms and conditions of the said policy. And the said plaintiff further says, that the said,

in his lifetime, did perform, fulfill, observe and comply with, and the said plaintiff since the death of the said, has performed, fulfilled, observed and complied with each and all of the conditions, provisos, and stipulations in the said policy contained, or to the same annexed, on the part and behalf of the said, in his lifetime, and of the said plaintiff,, since the death of the said, to be performed, fulfilled, observed and complied with, and neither the said in his lifetime, nor the said plaintiff, has violated any of the prohibitions in said policy contained, according to the form and effect, true intent and meaning of the said policy.

Yet the said plaintiff says, that although months have elapsed after due and sufficient proof was made, as aforesaid, to the said defendant, of the death of the said, the said defendant has not as yet paid to the said plaintiff the said sum of \$., but the same and every part thereof, has wholly refused to pay and hath always refused to pay, contrary to the force and effect of the said policy. And the said plaintiff further says that the said defendant has not kept with the plaintiff the agreement aforesaid, contained in said policy made in this behalf as aforesaid, but the said defendant has broken the same, and to keep same with the said plaintiff hath hitherto wholly refused, and still doth refuse.

To the damage of the plaintiff, \$.

And therefore she brings her suit.

1041 Life and accident, Narr. (Ill.)

For that whereas, heretofore, to wit, on the day of, 19.., at, to wit, in the city of, county aforesaid, the said defendant entered into a certain policy of insurance, instrument and an agreement with the plaintiff in the words and figures following, to wit: (Set forth policy of insurance and agreement of accident insurance); and upon the back of said instrument or policy of insurance appears the following: (Set forth notice); wherein and whereby the said defendant for a valuable consideration did insure the life of the said H of, in the county of, and state of, designated in the said policy as the insured, in the sum of (\$) dollars for the term of his natural life from and after the date thereof; which said sum should be paid at the office of the said company in,, to the plaintiff, wife of the said insured, within ninety days after due notice and direct evidence of the death of the said insured, during the continuance of said policy.

And the said plaintiff avers that the said insured, H, during his lifetime did in all things conform himself to, observe, perform and keep all things in the said policy of insurance on his

part and behalf to be observed and performed, according to the form and effect of the said policy of insurance.

And the plaintiff further avers, that the said II paid all the instalments of premium provided by the said policy to be paid by him from the date of the said policy up to and including the instalment of premium falling due thereon on the day of, 19., and all the sums due upon the contract of accident insurance annexed to the said policy from the date thereof, up to and including the amount due thereon on, 1....

And the plaintiff further avers that, on, to wit, the day of, 19., the said II, without the knowledge and consent of the said plaintiff, did execute and deliver to the said defendant, in payment of the premium of dollars, due on that day on the said policy of life insurance, and for the further sum of, due on said day of, 19., on said contract of accident insurance, annexed to the said policy, making the sum of dollars, his promissory note, which said note the defendant then and there accepted, as payment of the said instalment of premium, due on said life policy, and on said contract of accident insurance, and as full payment of the premium due on said life policy, and said contract of accident insurance, on said day of, 19., and each of the same and the whole thereof, and upon the acceptance of said note by the said defendant for such premium as aforesaid, the said defendant did then and there deliver to the plaintiff its properly executed premium receipt, provided for in the said policy, for the full payment of the said premium, due on the said life policy and contract of accident insurance, due on said day of, 19., for the six months then next ensuing, and ending the day of, 19., which said receipt is in the words and figures following, to wit: (Set out copy of receipt).

And the said plaintiff further avers that, on, to wit, the day of, 1...., the said note being then in the custody of and owned by the said defendant, the said II, by his agent, J, at the city of, county of, and state of, and at the office of the said company, the defendant herein, in said city, did offer to pay to the said defendant the amount then due on the said note, and the interest thereon, and did then and there offer to bring in and to pay to the defendant, on the next day, the same being the day of, 19., the amount in money then to become due on the said policy of life insurance, and the said contract of accident insurance, and the amount due on the said note with interest thereon; but the said defendant did then and there refuse to accept any money on said note, and did then and there wrongfully refuse to accept

at any time, any money in payment of the said note and interest thereon, or any part thereof, and did then and there wrongfully state that it would not receive any money in payment of the premium, or any part thereof to become due on the said policy on the said day of, 19.., and did then and there wrongfully refuse to accept any money in payment of any premium that might become due by the terms and conditions of the said policy of insurance, during the lifetime of the said H, and did then and there wrongfully claim, in response to the said offer of the said H, that the said policy was in all respects forfeited and that the said H owed the said defendant nothing by reason of the issuance thereof, or of the conditions thereof, and that the defendant would not accept any money in payment of the premium on the same.

And the plaintiff further avers that, on, to wit, the day of, 19.., and during the customary banking hours of the said day, and before the hour of twelve o'clock noon, of the said day, the said H, at the city of, county of, and state of, and at the office of the said company, the defendant herein, by his agent, J, said H having then and there a sufficient sum in lawful money of the United States, to wit, the sum of (\$.....) dollars, being a sufficient sum to cover the amount due on the said note, and all interest thereon, and being also a sufficient amount to cover the amount due on that day upon the said policy of life insurance and the said contract of accident insurance, and all interest that might be due thereon, according to the terms and conditions of the said policy, and, being the place where he was entitled to pay the premiums that might become due on the said policy, and where he was entitled to pay the said note, and where he was entitled to demand and receive the premium receipt of the said defendant, upon such payment to the defendant, did then and there, on behalf of the said H, offer to pay to the said defendant the said premium and the whole thereof, falling due on the said day of, 19.., according to the terms and conditions of the said policy, and did then and there demand of the said defendant, that upon such payment it should deliver its properly executed premium receipt as provided for in said policy, and did then and there offer to pay the said note and interest thereon and the whole thereof, and did demand that the said defendant surrender up to him the said note, but the said defendant did then and there wrongfully refuse to accept any money whatsoever, and did then and there refuse to turn over and deliver to the said J, the said note, and did then and there refuse to deliver to the said J its premium receipt upon the payment of the said premium that were due upon the said policy on said last mentioned day, according to the terms and conditions thereof, and in response to the said offer by the said J as aforesaid, did then and there wrongfully state and

claim to the said J that said policy was forfeited and void, and that said H owed the said defendant nothing by reason of the issuance thereof, and by the terms and conditions of the said policy of insurance, and did then and there wrongfully state to the said J, in response to his said offer to pay the said premium, that defendant would not accept any money as premium upon said policy, and would not deliver said premium receipt, and would not accept any payment of the said note, and would not accept any further instalments of premium that might become due by the terms and conditions of the said policy of insurance, during the lifetime of the said H.

And the plaintiff further avers that the said H, by his said agent, the said J, then and there had the said sum of money, and then and there offered to pay to the said defendant the said premium, and the amount of the said note and interest thereon as aforesaid, and for the purposes aforesaid, and would then and there have paid the same, and would have accepted the premium receipt, which the said H would be entitled to, upon the payment of the said premium, had not the defendant then and there wrongfully refused to accept such payment, and wrongfully asserted that the said policy was forfeited and void, and then and there wrongfully refused to deliver said premium receipt.

Plaintiff further avers that the said H, after the said offer on the said day of, 19.., by the said J, to so pay said note as aforesaid, was ever ready, willing and able during his lifetime to pay the said note, and was ever ready, willing and able to pay the said premium so falling due on the said day of, 19.., and was ever ready and willing to accept the said premium receipt he was entitled to upon such payment if the defendant would have accepted the same, and was ever ready, willing and able to pay every other instalment of premium which became due on the said policy of insurance during his lifetime, and to accept the properly executed premium receipt therefor, if the defendant would have accepted the same when it became due or at any time thereafter, and since the maturity of the said policy by reason of the death of the said H, said plaintiff has ever been ready and willing to allow the amount of the said instalment of premium falling due on the said day of, 19.., and all interest that may be found to be due thereon, together with all other instalments of premium falling due on the said policy of life insurance, according to its terms, during the life of the said H, and all interest that may be found to be due on each and every of such instalments in abatement and in reduction of the sum now due to her upon the maturity of the said policy of life insurance by the terms and conditions thereof, and she hereby authorizes and consents that all such sums be allowed in abatement of and in reduction of the sum due to her as aforesaid, and that such allowance, abate-

ment and reduction be embraced in any verdict or any judgment found or rendered in her favor in this action.

And the plaintiff further avers that afterwards, to wit, on the day of, 19.., the said H died; that afterwards, to wit, on the day of, 19.., due notice and direct evidence of the death of the insured, during the continuance of this policy, was given to the defendant company; that during his life the said H was prevented and absolved by the defendant from the payment of the premium falling due on the said policy of life insurance, by its terms, on the day of, 19.., and was prevented and absolved by said defendant from the payment of the several premiums thereafter falling due upon the said policy of insurance, at the time and in the manner as provided in said policy; and that although the ninety days after due notice and direct evidence of the death of the said insured during the continuance of said policy have been given to the said defendant, according to the terms of the said policy, have long since elapsed, of all which said defendant afterwards, on, to wit, the day and year last aforesaid, had notice, and said defendant was then requested by the plaintiff to pay her the said sum of (\$.....) dollars so by it insured, as aforesaid; yet, said defendant, disregarding its said promise, has not paid the said sum of (\$.....) dollars, or any part thereof, but has wholly neglected and refused so to do, to plaintiff's damage of dollars.

1042 Ordinary; premium, payment

The premium of a policy may be paid by note by agreement of the parties, and when a note is taken under circumstances which constitute an absolute payment of the premium, the default in the payment of the note does not invalidate the insurance.⁸⁸

1043 Ordinary; delivery of policy, liability

An insurance policy is in force at the time of the approval of the application, the payment of the premium, the signing of the policy, and its issuance at the office of the company, regardless of the actual delivery of the policy to the insured.⁸⁹ The policy is in force upon its unconditional delivery, notwithstanding an express provision therein that the company shall not be liable until the premium is actually paid; as such a delivery consti-

⁸⁸ Devine v. Federal Life Ins. Co., 250 Ill. 203, 207, 208 (1911).

⁸⁹ Rose v. Mutual Life Ins. Co., 240 Ill. 45, 51, 52 (1909).

tutes a waiver of the prepayment of the premium.⁹⁰ An insurance policy which has been duly signed and forwarded to the insurance broker to whom the application for insurance was made, to be delivered to the insured, will support an action thereon, unless actual delivery of the policy to the insured is expressly required by contract.⁹¹ The insurer is liable for damages and costs incurred by the insured after the insurer has wrongfully refused to recognize his liability on the policy, although the damages and costs together with a judgment upon the policy exceed its face.⁹²

1044 Ordinary, general, Narr. (Ill.)

For that whereas, heretofore, to wit, on the day of, 19.., said defendant caused to be made, executed and delivered to M, hereinafter called the insured, a certain policy of insurance, in writing, upon the life of the said insured, wherein and whereby said defendant, in consideration of the payment of dollars, to be paid on the delivery of the said policy, or before it should take effect, and of the promise of the said insured to further pay an equal sum on the day of, 19.., undertook and promised to and did insure the life of the said M, the said insured, for the term commencing simultaneously with the actual delivery of said policy to the said insured and the payment of said premium, and ending with the day of, one year from the date of said policy, to wit, on, 19.., and by such insurance said defendant promised upon the death of the said insured during the aforementioned term of insurance, and upon the surrender of the said policy and the receipt and approval of proofs of death of the said insured during the continuance of the said contract of insurance, to pay to the said plaintiff the sum of at the home office of the said defendant in the city of, The plaintiff says also that it was further provided in said policy that said policy should not take effect until the first premium of had been paid and the policy actually delivered during the life and good health of the said insured, and that the said policy contained, and to the same annexed were and are sundry other provisos, conditions and stipulations as by the original policy aforesaid (a copy whereof is filed herewith) will more fully appear. The plaintiff further says that after the said policy was made and executed as aforesaid, and during the life and good health of the said insured, said policy was actually delivered to the said insured by the said defendant

⁹⁰ People v. Commercial Ins. Co.,
247 Ill. 92, 103 (1910).

⁹¹ Devine v. Federal Life Ins. Co.,
250 Ill. 203, 206 (1911).

⁹² Sandoval Zinc Co. v. New Amsterdam Casualty Co., 235 Ill. 306,
313 (1908).

and the first premium, amounting to dollars, was duly paid, and the promise of the said insured to further pay an equal sum on the day of, 19.., was duly made; and that thereafter during the continuance of the said policy, to wit, on the day of, 19.., the said M departed this life, whereof afterwards, on, to wit the day of, 19.., due and sufficient proof was made to said defendant in conformity with the terms and conditions of said policy; and that this plaintiff was at all times before the bringing of this suit, and ever since has been, ready and willing to deliver up said insurance policy to the said defendant company, but that no surrender or offer to surrender up said policy to the said defendant company was ever formally made before the bringing of said suit for the reason that the said defendant had then wholly refused and has always since refused to pay the said amount so promised to be paid as aforesaid under any circumstances. And the plaintiff further says that the said insured in his life time did perform, fulfill, observe and comply with, and that the said plaintiff at all times has performed, fulfilled, observed and complied with each and all the conditions and stipulations in said policy contained or to the same annexed on the part and behalf of the said insured in his life time, or of the said plaintiff at any time to be fulfilled, performed, observed or complied with; and that the said insured in his lifetime did not, nor has the said plaintiff at any time violated any of the provisions in the said policy contained or to the same annexed according to the terms and effect, true intent and meaning of said policy.

Yet the plaintiff says that though a long time, to wit, the space of months, has elapsed since due and sufficient proof was made as aforesaid to the said defendant of the death of the said M, said insured, and since the performance by the said plaintiff of all the conditions hereinabove mentioned to be performed before the fulfillment of the said promise of the said defendant as aforesaid, said defendant has not yet paid to the said plaintiff said sum of dollars, but the same and every part thereof is wholly due, unpaid and unsatisfied to her, contrary to the force and effect of said policy; and so the said plaintiff says that the said defendant has not kept with the said plaintiff the agreement aforesaid contained in the said policy executed as aforesaid by the said defendant, but that the said defendant has broken the same and to keep the same with the said plaintiff has hitherto wholly refused and doth refuse; to the damage, etc.

1045 Ordinary; non-constable policy, Narr. (Ill.)

I

1. For that whereas, on, to wit, the day of, 19.., said defendant made a certain insurance policy in writ-

ing and delivered the same to, by which, in consideration of certain stipulations and agreements in a certain application by him theretofore made a part of said policy, and in consideration also of the payment of dollars and therein expressed as being the premium thereon for the first year thereof, promised to pay the plaintiff by the name, style and description of, the wife of said, in his lifetime, or to her legal representatives and assigns, the sum of dollars less any indebtedness on account of said policy, within days after acceptance at the office of said defendant in the city of, of satisfactory proofs of the death of said of, county, Illinois, provided such death should occur on or before the day of, 19...

2. And the said defendant in said contract of insurance further agreed to renew and extend said insurance upon the aforesaid conditions without medical re-examinations during each successive year of the life of the insured from the date thereof, upon the payment on or before the day of, in each year, of the renewal premiums in accordance with a certain schedule of rates, less the dividends thereon, in said policy set out; and said defendant in and by said policy, in consideration of the premises, further agreed that said annual premiums might be paid by quarterly instalments on or before the day of, in each year.

3. And said defendant for the same consideration further agreed to limit its expense charge, that is to say, its charge for conducting its business of insurance to dollars per annum on each thousand dollars insured and to divide the residue of each renewal premium in said policy mentioned as follows: Such amount as should be required for said policy's share of death losses to the appropriation of a death fund to be used solely in the settlement of death claims, and the remainder to be used as a guaranty fund towards offsetting any increase in premiums on said policy from year to year, and for the purpose of keeping the premiums equal or level with that for the year 19.., at which time the said was years of age, and the quarterly premiums for that age were dollars as set forth in the schedule of quarterly renewable rates for the sum of dollars insurance.

4. And the plaintiff avers that said caused to be paid to said defendant from the said day of, 19.., up to the day of, 19.., the sum of dollars for each quarter of a year for the renewal and extension of said premiums; and on the day of when the said, caused to be paid the quarterly premium for such renewal, the said defendant fraudulently and in violation of its contract required the sum of dollars as and for a quarterly

renewal premium to renew and extend said policy of dollars, which sum the said paid to the defendant and continued to pay on or before the required day of each quarter until the day of, 19.., for the extension and renewal of said policy of insurance.

5. And the plaintiff further avers that, on to wit, the day of, 19.., she appeared on behalf of said at the office of the defendant in the city of, and tendered and offered to its authorized agent the exact sum of dollars in specie of the United States as and for the renewal and extension of said policy from, 19.., to, 19..; whereupon said agent stated to the plaintiff that he, in behalf of the defendant, would not accept said sum of dollars for the reason that said defendant had raised the renewal rates and that the sum of dollars would be required to renew and extend said policy to, 19.., and that there was no guaranty fund with which to offset the increase in the premium or to keep the same level with the rate of premiums at which said had paid since, 19...

6. And the plaintiff avers that the statements aforesaid of said agent were false and fraudulent and were wrongfully made for the purpose of compelling the said to discontinue the renewal of said policy, and that on the day aforesaid, he had funds to his credit in the hands of said defendant and to the credit of the said policy, as part of the guaranty fund aforesaid, sufficient to keep said renewal premiums to the level of dollars aforesaid on said date and up to and beyond the date of the death of, and that such increase in the rate was a fraud upon said and the plaintiff, and that such tender aforesaid was sufficient to bind said defendant and then and there constituted a payment for the renewal and extension of said policy during the whole period within which said sum of dollars together with such guaranty fund would have constituted a renewal payment for such policy, to wit, until, 19...

(Consider paragraphs 9, 10 and 11 of count IV as here repeated the same as if set out in words and figures.)

II

(Consider paragraphs 1 and 2 of count I as here repeated the same as if set out in words and figures.)

3. And the plaintiff further avers that one of the paragraphs on the page of said policy is headed in large black type, as follows: "Regarding the death and guaranty fund," and that said paragraph is in the following words and figures, viz.: (Set forth paragraph).

4. And the plaintiff avers that the said paid to the said defendant all renewal premiums demanded by it, and that it did not as it agreed, keep said premiums level, but on

the contrary, on, 19.., increased said renewal premiums from \$...... per one thousand dollars of insurance for one quarter to \$...... dollars per one thousand dollars of insurance for one quarter, which the said paid and continued to pay at said rate of \$...... per one thousand dollars until, 19.., when said defendant again increased the premium rate to \$...... per one thousand dollars of insurance.

5. And the plaintiff further avers that, on, to wit, 19.., she appeared at the office of the said defendant and offered and tendered to an authorized agent of said defendant, the sum of dollars, in specie of the United States, being the quarterly premium of dollars for the then next ensuing quarter, at which rate the said had renewed said policy from the day of, 19.., till that date, to wit,, 19..; whereupon, said agent refused to accept said sum of dollars and stated to the plaintiff that the rate had been increased and that it would require the sum of dollars to renew said policy for the then next ensuing quarter. And the plaintiff avers that she then demanded of the said agent, for and on behalf of said that the amount retained of premiums paid by said under the guaranty fund clause of said policy, be applied to extend said policy, or that said defendant issue to said paid up insurance purchased with the amount so retained; which the said defendant then refused and ever since has refused to do.

6. And the plaintiff avers that the said had then paid to the defendant for more than full years premiums, and had then paid full years' premiums; and that said defendant after deducting dollars per annum for dollars of insurance for its expense charge, and after deducting from the premiums so paid said policy's share of death losses that there remained a sufficient sum in its hands to have extended said insurance to, 19.., and beyond that date, by using% of the amount retained in its hands after deducting said expense charge, death losses, and money used to offset increase in premiums so far as said defendant did offset such increase.

7. And the plaintiff further avers that said increase to dollars per quarter made, on, to wit,, 19.., by the defendant was fraudulent and done for the purpose of compelling said to discontinue the payment of renewal premiums and that the said defendant had in its hands a sufficient sum under the said guaranty clause of said policy, to extend the same to, 19.., and that said policy under said clause and because the said defendant had sufficient money of said guaranty fund as aforesaid to extend said policy to said, 19.., was in full force

and effect on the date of the death of said to wit, on, 19...

(Consider paragraphs 9, 10 and 11 of count IV as here repeated the same as if set out in words and figures.)

III

(For a third count consider paragraphs 1 and 2 of count I as here repeated the same as if set out in words and figures.)

3. And the plaintiff avers that beginning with, 19.., aforesaid, the said paid or caused to be paid to said defendant up to, 19.., all the premiums required or demanded of him by said defendant, to be paid to renew and extend said policy; that he paid such premiums by quarterly instalments on or before the day of of each year from, 19.., to, 19.., that is to say, for full years.

4. And the plaintiff further avers that under and by virtue of the statutory laws of the state of, in which state said defendant was incorporated, it is provided that whenever any policy of life insurance issued after 19.., by any domestic life insurance corporation, after being in force years, shall by its terms lapse or become forfeited for the non-payment of premiums or any note given for a premium or loan made in cash on such policy as security, or of any interest on such note or loan, the reserve of such policy computed according to the American experience tables of mortality at the rate of per annum shall on demand made with surrender value of the policy within months after such lapse or forfeiture, be taken as a single premium of life insurance at the published rates of the said corporation at the time the policy was issued, and shall be applied as shall have been agreed in the application or policy either to continue the insurance of the policy in force at its full amount so long as such single premium will purchase temporary insurance for the amount at the age of the insured at the time of the lapse or forfeiture, or to purchase paid insurance; or if there be no such agreement in the policy, such single premium may be applied in either of the specified modes aforesaid, at the option of the owner of the policy, notice of such option to be contained in the said demand.

5. And the plaintiff avers that the said policy was issued after, 19.., and on, 19..; that said defendant is a domestic corporation of the state of; that said policy was in force for more than years and was in force full years; and that the said complied with all the conditions, stipulations and provisions thereof; and paid to said defendant all premiums required and demanded by it upon said policy for the renewal of the same; that on, to wit,, 19.., the plaintiff then and there, acting for said tendered and offered to an author-

ized agent of the defendant the sum of dollars as and for the renewal premium upon said policy for the period beginning, 19.., and ending, 19.., which was the amount the said had paid during each quarter from, 19.., for the renewal and extension of said policy; which the said agent then and there refused to receive upon the ground that the renewal rate on said policy had been increased. And thereupon, then and there and at other times within months of the said, 19.., the said demanded of the defendant that the reserve on such policy computed according to the American experience tables of mortality at the rate of per annum with the surrender value of said policy to be taken as a single premium of life insurance at the published rates of the said corporation at the time the said policy was issued either to continue and extend the said insurance in force for the full amount so long as said single premium would purchase temporary insurance at the age of the insured at the date of the said lapse of said policy on, 19.., to wit, at the age of years, or to purchase paid insurance; which the said defendant, then refused and at all times, and ever since has refused to do.

6. And the plaintiff avers that the reserve on said policy computed according to the American experience tables of mortality, at the rate of% per annum on, to wit,, 19.., amounted to, to wit, dollars, and that the surrender value of said policy on said date was, to wit, dollars, which sums, or either of them, were sufficient to extend and renew said policy until, to wit,, 19...

7. And the plaintiff further avers that in all of the years during which the said paid to the defendant the premiums demanded, the actual losses of said defendant were greatly less than the expected and anticipated losses as computed by the actuaries upon the American experience tables of mortality; that in consequence thereof, the said defendant saved large sums of money in its business of insurance between the expected and realized losses which the said defendant under said policy of insurance and the laws of the state of, was and is bound to a credit on the said policy for the purpose therein expressed and embodied in the said statutory law of the state of

8. And the plaintiff avers that under and by virtue of the laws of the state of, the said defendant was bound to extend and renew said insurance; that by virtue of said laws said policy could not become lapsed for failure to pay any renewal premium, so long as the said policy had been in force full years, and so long as there was the reserve thereupon as aforesaid, computed as aforesaid to be taken as a single premium for the continuance of such insurance as provided by the said laws.

(Consider paragraphs 9, 10 and 11 of count IV as here repeated the same as if set out in words and figures.)

IV

(For a fourth count, consider paragraphs 1 and 2 of count I to star as here repeated the same as if here set out in words and figures.)

3. And the plaintiff avers that said policy of insurance was not a policy of term insurance for years or less, but was a continuing insurance on the life of said, upon the payment of the lawful premiums as expressed in said schedule in said policy contained and the contemporary stipulations and agreements also in said policy contained.

4. And the plaintiff further avers that by the terms of said policy the premiums due and payable to keep said policy in force were variable and that such premiums in amount were subject to change by the provisions of said policy aforesaid; that the rates in said schedule contained were subject to diminution by the dividends thereon and also by the provisions in said policy contained; that the guaranty fund of said policy accumulated less the payment of the policy's share of death losses and the expense charge limited to dollars per thousand per annum was to be used by said defendant to keep the premiums due and payable on said policy level with the premium due and payable upon the issuance of said policy of insurance.

5. And the plaintiff further avers that by virtue of the statutory laws of the state of, in which said defendant did and still does business, it is provided that no life insurance corporation doing business in said state of shall declare forfeited or lapsed any policy hereafter issued or renewed and not issued on payment of monthly or weekly premiums, or unless the same is a term insurance contract, for one year or less, nor shall any such policy be forfeited or lapsed by reason of non-payment when due of any premium, interest or instalment or any portion thereof required by the terms of the policy to be paid, unless written or printed notice stating the amount of such premium, interest, instalment or portion thereof due on such policy, the place where it should be paid and to whom the same is payable, shall be duly addressed and mailed to the person whose life is insured, or to the assignee of the policy if notice of the assignment has been given to the corporation, taking his or her last known postoffice address, postage paid by the corporation or by an officer thereof or person appointed by it to collect such premium, at least fifteen and not more than forty-five days prior to the date when the same is payable. And said statutory law further provides that said notice shall also recite that unless such premium, interest, instalment or portion thereof then due, shall be paid to the corporation or to a duly appointed agent or person authorized

to collect such premium, by or before the date it falls due, the policy and all premiums thereon will become forfeited and void, except as to the right to a certain valued or paid up policy, as in the chapter in which said section of said statutory law occurs is provided.

6. And the plaintiff further avers that the said caused to be paid to the defendant all the premiums demanded by said defendant under said policy from the day of, 19.., up to the day of, 19.., quarterly in advance on or before the day of of each year; that owing to the terms of said insurance policy, said assured could not and did not know the amount of quarterly premium that could be and would be demanded by said defendant to keep said policy in full force and effect; that by the terms of said policy the assured was required to pay by way of renewal premiums according to certain schedule rates in said policy of insurance included, less the dividends awarded thereon; and it was further provided that the surplus accruing to the credit of said policy was to be applied towards keeping the premiums level with the premium at the date said policy was issued; and that by reason thereof the renewal premiums on said policy designed to be and were in fact variable and the amount thereof could not be known by the assured, unless the assured was notified by said defendant company; of which said defendant company at all times had notice, and at all times had in its possession the complete data from which it could compute the amount of renewal premiums.

7. And the plaintiff further avers that she was the wife of the said during his lifetime, and that she acted for the said assured and as his agent in paying the premiums due and demanded on said policy; that, on, to wit,, 19.., she, on behalf of said assured, offered to pay to said defendant the sum of dollars, as and for the renewal premium and extension of said policy from, 19.., which was the amount of quarterly premium on said policy of dollars, which she had paid on behalf of said assured to said defendant for the renewal of said policy from, to wit,, 19..; and that said authorized agent at said time and place refused to accept said sum of dollars as the renewal premium, and demanded of the assured through the plaintiff for the renewal and extension of said policy from, 19.., to, 19.., the sum of dollars.

8. And the plaintiff further avers that said assured never at any time had any notice of the amount of premium which would be demanded by or be due to said defendant on, 19.., prior to the time aforesaid, when plaintiff on behalf of said assured offered to pay the sum of dollars to said defendant for the said renewal premium; and that no

written or printed notice was ever given to the assured, or to any one representing him as required by the said statutory law, stating the amount of premium due, the place where it should be paid, and if the same was not paid at a given place and time, the said policy should become forfeited and void; and that said assured never knew prior to the date when the plaintiff offered the said sum of dollars to the defendant, that said defendant demanded a larger or different amount, or that said premium would be increased on said, 19...

9. And the plaintiff further avers that the said, the assured, departed this life on, to wit, the day of, 19.., and that on, to wit, the same day, the plaintiff offered and desired to make to said defendant, as in and by said policy required, proofs of the death of the said and said defendant on, to wit, the same day waived said proofs of death and refused to pay the said sum of dollars in said policy mentioned, on the ground that said policy was not in force at the time of the death of the said, but that said policy had become forfeited and lapsed and void on, 19.., for the failure on the part of said assured to pay the renewal premium alleged by said defendant to be due on said date.

10. And the plaintiff avers that the said in his lifetime did perform, fulfill and comply with all the conditions, provisions and stipulations in said policy contained or thereto annexed according to the due effect and meaning of the same; and as by said policy provided, he duly renewed the same from time to time, and offered on, to wit,, 19.., to renew the same according to the terms and meaning of said policy, and kept the same in full force and effect; and that said policy was in full force and effect at the time of the death of the said; and that the plaintiff has fully observed the terms and conditions thereof.

11. Yet, the plaintiff avers that although more than days have elapsed since the said refusal to allow the plaintiff to make proofs of death as she was then and there willing and able to make the same, said defendant has not paid the plaintiff the said sum of dollars, or any part thereof, but to keep and perform any and all of the conditions and undertakings of said policy, has wholly neglected and refused, to the damage, etc.

1046 Ordinary; payment of premium extended, Narr. (Ill.)

For that whereas, heretofore, to wit, on the day of, 19.., at the city of to wit, in said county of, said defendant made its certain policy of insurance of that date numbered and then and there delivered the same to, late

of the said city of and husband of the plaintiff, in and by which said policy said defendant, in consideration of the application therefor and of the premiums paid and assumed to be paid to said defendant upon and for the said policy as therein mentioned assured the life of the said in the amount of dollars from during the continuance of said policy and contract, and did further promise and agree to pay said sum of dollars at its principal office in to the plaintiff within days after satisfactory proofs (under oath on the company's blanks) of the death of said insured, the balance of the year's premium, if any, and any other indebtedness to the company being first deducted therefrom; the said policy being hereto attached and hereby referred to and made a part hereof.

And the plaintiff avers that all of the said premiums mentioned in said policy and due on and in each year were fully paid on said dates except the semi-annual premium due on and which said payment of said last premium was duly extended by said defendant for days from said last date, and the payment of which said last premium was duly tendered to said defendant before the expiration of said extension, to wit, within days from said

And the plaintiff further avers that the said departed this life on, in the city of, said county of, and while said policy was in full force and effect; that afterward, to wit on, the plaintiff, being the widow of said deceased, furnished to the defendant proofs of death of said, which proofs were made on the blanks of the defendant furnished by the defendant to the plaintiff, were properly filled out and which were accepted by the defendant in full compliance with the requirements of said defendant and within the time directed by said defendant.

By means whereof the said defendant became liable to pay to said plaintiff the said sum of dollars according to the tenor and effect of said insurance policy; and being so liable, said defendant, in consideration thereof, afterwards, to wit, on the date and at the place aforesaid, undertook and then and there promised to pay the said plaintiff said sum of money in said policy mentioned according to the tenor and effect thereof. Nevertheless, etc.

1047 Sick benefit, Narr. (Md.)

For that the defendant is a corporation duly incorporated under the laws of the state of, and during the times hereinafter mentioned was and now is engaged in the business of accident and liability insurance in the city of, state of Maryland, and issues policies agree-

ing to pay certain sums of money in the event that the party named in said policy shall become injured by accident and indemnifying him against disability from illness; and in pursuance of and in accordance with the business of said defendant, and for a good and valuable consideration, to wit, the sum of (\$.....) dollars paid by the said to said defendant on or about the day of, 19.., the defendant issued to the said a certain policy or certificate of insurance designated as No., wherein and whereby said defendant promised and agreed to pay to the plaintiff, the said, certain sums of money, according to a schedule of operations attached to said policy, and a further sum for each week during the disability of said resulting from such illness.

And the said on the day of, 19.., was operated on for a certain disability mentioned in said schedule, to wit, mastoiditis, and was thereby incapacitated and disabled from performing his usual business duties for a period of weeks, accounting from the day of, 19... And the said furnished the defendant with notice of said illness and operation and gave proper and sufficient proof of said operation and illness, in accordance with the requirements of said policy and contract; and said plaintiff has performed all the conditions and stipulations of said policy on his part to be performed, but said defendant has refused and still refuses to pay to said plaintiff the sum of (\$.....) dollars, due and owing to said plaintiff under said policy.

And the plaintiff claims (\$.....) dollars.

1048 Suicide, liability

In case of an assured's suicide while sane the right of recovery on an ordinary life insurance policy depends upon the absence of a provision in the policy against liability under the circumstances and also upon the character of the beneficiary. If the policy is payable to the estate of the deceased, no recovery can be had under it; but if the policy is payable to a third person, the policy is enforceable. So, in fraternal insurance, the intentional self-destruction of the assured while sane does not defeat the right of his beneficiary, if it be his wife, to a recovery, where the contract of insurance is silent on the rights of the parties in case of self-destruction.⁹³

⁹³ Select Knights of America v. Supreme Conclave v. Miles, 92 Md. Beaty, 224 Ill. 346, 349, 351 (1906); 613 (1901).

**1049 Manufactured articles for dealer, acceptance refused,
Narr. (Ill.)**

For that whereas, heretofore, to wit, on the day of, 19.., C was then and there employed and engaged in the work of cutting, designing and manufacturing ladies' cloaks and garments for M, in the city of and county aforesaid, and whereas the said defendant herein was then and there engaged in the wholesale dry goods business and manufacturing, buying and selling ladies' cloaks and garments, and being so engaged in said business on the day and year last aforesaid, and being desirous of having the services of said C in and about the manufacture of such cloaks and garments as said defendant might want, the said defendant on the day and year last aforesaid then and there requested the said C to obtain another person with capital and means for the purpose of carrying on the business of manufacturing such cloaks and garments as aforesaid, and such as the said defendant would order, and then and there promised the said C that said defendant would buy and receive and accept from such person whom he, said C, would associate with him when the same would be so manufactured by him, such cloaks and garments to be ordered by him, to the amount of (\$.....) dollars, and pay to the said person whom the said C would associate with him in the said enterprise, a sum equal to per cent upon the cost price of said cloaks and garments so to be ordered by and manufactured for said defendant; that the said C then selected and obtained said plaintiff herein for the purpose of manufacturing and delivering said cloaks and garments as aforesaid to the said defendant, who then and there was satisfactory to and accepted by said defendant as such manufacturer; and plaintiff says that said C before then, had never been engaged in the manufacture of cloaks and garments nor had he before then fitted up premises or purchased any cloths or materials, nor engaged help in the manufacture of such cloaks and garments, nor had he any money or means for the same, but the defendant being then and there desirous, as aforesaid, to have said plaintiff engage in the manufacture of said cloaks and garments, and to have said C employed and engaged by said plaintiff, as the cutter and designer of such cloaks and garments to be manufactured by said plaintiff as aforesaid, he, the said defendant, then and there induced said plaintiff to engage in the said business of manufacturing the said cloaks and garments as aforesaid, and to buy goods, wares, merchandise and machinery and apparatus for the manufacture of the same, and also to rent, lease and fit up the premises wherein the same were to be so manufactured as aforesaid, and to employ divers persons in and about the manufacture of such cloaks and garments, and then and there undertook and promised, to wit, at the county aforesaid, on the day and year

last aforesaid, in consideration of the premises, and in consideration that the said plaintiff aforesaid would manufacture and make for him, the said defendant, ladies' cloaks and garments to the amount of (\$.....) dollars as the same should be ordered by him, the said defendant, and would deliver said cloaks and garments when completed, to said defendant, and he, the said defendant, then and there undertook and promised the said plaintiff to accept cloaks and garments of said plaintiff when so manufactured and made, and pay him for the same, the said cost price thereof, to wit, the amount of (\$.....) dollars together with a profit of per cent of such cost price of such cloaks and garments on the delivery of them, from time to time as the same were ordered and delivered; and said plaintiff avers that he, confiding in said promises and undertakings of said defendant, to wit, on the day and year last aforesaid, and for a long time thereafter, to wit, at the county aforesaid, purchased a large amount of cloths, trimmings, and other goods and chattels used in and about the manufacture and making of the said cloaks and garments, and samples thereof, for the said defendant, and also purchased a lot of machinery and apparatus used in and about the manufacture of such cloaks and garments, and leased and rented the premises and fitted the same up for the purpose of so manufacturing such cloaks and garments as aforesaid, and also employed and hired divers persons in and about the manufacture of the same, and did, to wit, at the county aforesaid, for a long time thereafter, to wit, for the period of months after the day and year last aforesaid, manufacture cloaks and garments for the said defendant as a part and parcel of the said cloaks and garments so to be accepted by said defendant, to wit, a part and parcel of said cloaks to the amount of (\$.....) dollars.

And plaintiff avers that being so induced to purchase said cloths, materials, machinery and apparatus, and to lease and rent premises and to fit the same up and to employ divers persons in and about the manufacture of said cloaks and garments and to manufacture and make the same, he, said plaintiff, was ready and willing and then and there offered to deliver the same to the said defendant, and requested him to accept the same as well as the remainder of said quantity so to be manufactured for said defendant; all of which said premises the defendant then and there had notice; and he did then and there submit to said defendant such cloaks and garments so manufactured by said plaintiff for the said defendant, which said cloaks and garments plaintiff avers were duly approved of by the said defendant; yet the said defendant not regarding his said promises and undertakings and knowing that by reason of his said promises and undertakings, as aforesaid, he induced and obtained said plaintiff to buy said goods, clothes and material, and the said machinery and apparatus necessary for the

manufacture of such cloaks and garments, and to lease and fit up premises and to employ and hire divers persons for the manufacture of the same, but contriving and intending to injure plaintiff in this behalf, did not nor would then nor at any other time accept said goods and chattels so made and manufactured by said plaintiff or any part thereof, nor pay him, the said plaintiff, said price thereof or any part thereof, but he to do so wholly failed, and still wholly fails and refuses so to do, to wit, at the county aforesaid; nor would he order nor accept from the said plaintiff, the remainder of the said cloaks and garments so to be manufactured by the said plaintiff for the said defendant, to wit, to the amount of (\$.....) dollars, but to do so neglected and absolutely refused and still refuses to accept or receive the same or any part thereof, to wit, at the county aforesaid.

And plaintiff avers that in consideration of said promises and undertakings of the said defendant as aforesaid, and the breach thereof by the said defendant, he, the said plaintiff, was obliged to and did sell said cloaks and garments so manufactured and made for the said defendant at a great sacrifice, to wit, at the sacrifice of fifty per cent of the value thereof; and being induced by said defendant as aforesaid, and in order to keep and perform his said promise and undertaking to manufacture such cloaks and garments, he, the said plaintiff, was obliged to and did pay, lay out and expend for help and labor in and about the manufacture of said cloaks and garments, a large sum of money, to wit, the sum of (\$.....) dollars, and also for machinery and apparatus necessary and used in and about the manufacture of the same, a large sum of money, to wit, the sum of (\$.....) dollars, and also for the rental and fitting up of the premises necessary and used in and about the manufacture of said cloaks and garments a large sum of money, to wit, the sum of (\$.....) dollars; of all of which said premises said defendant had notice, to wit, at the county aforesaid, whereby said plaintiff has lost and been deprived of the benefit of said per cent of said sum of (\$.....) dollars, so to be paid to him for the manufacturing and delivering of said cloaks and garments to the said defendant as aforesaid; and he was also obliged to and did sustain great loss and injury by selling said cloaks and garments so manufactured, at a sacrifice; and he was obliged to and did pay, lay out and expend large sums of money for help and labor by fitting up said premises in and about the manufacture of said cloaks and garments as aforesaid; and he was obliged to and did sustain great loss in and about the disposition of the cloths and materials purchased by said plaintiff for the purpose of carrying out his promise and undertaking in the premises; and he was obliged to and did pay out large sums of money for and on account of rental for premises to be used for the purpose of manufacturing said cloaks and garments, and

for machinery purchased for the purpose of manufacturing said cloaks and garments for said defendant; of all of which said defendant had notice, to wit, at the county aforesaid. Wherefore plaintiff says he is injured to the extent of (\$.....) dollars, therefore, he brings his suit, etc.

1050 Manufactured building material, acceptance refused, Narr. (Ill.)

For that whereas, heretofore, to wit, on the day of, 19.., at, to wit, at the county aforesaid, in consideration that the plaintiff.. would make or cause to be made and furnished for the defendant.. at h.. request (Describe goods to be made), and set same up ready for use in defendant..' new building in at and for the price of dollars, and would deliver to ..h.. the said (Describe goods) and set up in said building on the day of, 19.., ..h.., the defendant.., promised the plaintiff.. to accept of ..h.. the said (goods) when the same should be so made, and to pay ..h.. the said price for the same, on the delivery thereof as aforesaid. And the plaintiff.. aver.. that ..he.. did afterwards, to wit, on, etc., there make the said (Describe goods) for the defendant.., and thereupon then and there ready and willing and offered to deliver the same to ..h.. and requested ..h.. to accept and pay for the same as aforesaid. Yet, the defendant.. did not, nor would then or at any other time accept of the plaintiff... the said (Describe goods) or pay.... therefor the price aforesaid, or any part thereof, but refuses so to do. (Add common counts)

1051 Manufacturing goods per sample, refusal, Narr. (Ill.)

For that whereas, on, to wit,, 19.., in, in the county aforesaid, the plaintiff.., at the request of the defendant.., bargained for and agreed to buy of the defendant.. a large quantity, to wit, gross of wood ink bottles, gross of bottoms for bottles, gross of tops for bottles, gross of necks for bottles, and such other goods of the same quantity as the plaintiff.. should require for use in ..h.. business during the year, the plaintiff.. being then and there a manufacturer of inks and blueing; that such goods were bargained for by the plaintiff.. from the defendant.. on the following terms, that is to say, gross two ounce bottles like sample, marked "A," at (State price), said order having been given on the basis of the prices being outside figures, and orders in addition to the above having been left open to competition; it being agreed between the plaintiff.. and the defendant.. that the defendant.. w.... bound to manufacture during the year,

in addition to said order, all of the goods of like character as was stated in the contract, which plaintiff.. needed for use in ..h.. business at prices not exceeding prices named in said contract, which said contract and order above referred to is hereto attached, marked exhibit "A." And thereupon, in consideration of the premises and that the plaintiff.. had promised the defendant.. at ..h.. request to accept the delivery and shipment of all of the goods mentioned in the above described contract and order as aforesaid, and to pay the defendant.. for the same at the rates in said contract mentioned as aforesaid, in the county aforesaid, said defendant.. promised said plaintiff.. that ..h.., the defendant.., would, within a reasonable time then next following, procure to be delivered and shipped to the plaintiff.. in manner aforesaid the said quantity of goods above mentioned of the quality called for by the samples above referred to, at the prices above named and contained in said contract, and such other goods of the same quality and at the same prices as are named in said contract to which reference is made. That the time for making shipment and delivery as aforesaid has long since elapsed and the plaintiff.. w.... always during and since that time ready to accept the delivery and shipment of all such goods described in said agreement and such other goods as ..he.. might order, and to pay for the same as aforesaid, whereof the defendant.. then had notice; yet, the defendant.. (though often thereto requested), did not nor would within such reasonable time or afterwards procure to be delivered or shipped, for the plaintiff.. in manner aforesaid, or otherwise, the said amount of manufactured goods of quality aforesaid or any such goods whatever, but refused and still refuse.. so to do.

By means whereof, the plaintiff.. ha.. been deprived of great gains and profits which ..he.. might and otherwise would have acquired, being unable to place ..h.. inks and blueing therein and to put the same upon the market, at the time when it would have been most advantageous for ..h.. to do so; but the plaintiff.., on account of the failure and refusal of the defendant.. to carry out said contract, w.... compelled to purchase manufactured goods of the same character as those which were to be furnished by the defendant.., paying therefor prices much higher than the prices agreed upon in the said contract; and the plaintiff.., relying upon the promises of the defendant.. in said agreement entered into betweensel.... and the defendant.., disposed of a large quantity, to wit, dollars' worth of glass goods owned by the plaintiff.., intended for use in and about the business of the plaintiff.., discounting the same at the rate of per cent with the intention of substituting them by goods bargained for of the defendant.., for the glass goods so sold at a sacrifice by the plaintiff..; and the plaintiff.. say.. that by reason of having relied upon the promise of the defendant.. to furnish the goods men-

tioned in said agreement, and so relying upon the promises of the defendant.. having sold the glass goods then owned by the plaintiff.., and the defendant.. not having furnished the goods agreed to be furnished by ..h.., the plaintiff.. w.... prevented from placing ..h.. inks and blueing upon the market, for a long space of time, to wit, for about the space of months, and w.... thereby deprived of great gains and profits which ..h.. might have acquired by being enabled to sell ..h.. own goods put up in the packages bargained for of the defendant..; wherefore the plaintiff.. say.. that ..he.. injured and ha.. sustained damage to the amount of dollars; and therefore bring.. ..h.. suit.

1052 Manufacturing plant, refrigerating system, Narr. (Ill.)

For that whereas, heretofore, to wit, on the day of, 19.., at, to wit, in the county aforesaid, the plaintiff and defendant made and entered into a certain agreement in writing of which the following is a true copy, and thereby mutually undertook and promised as is therein set forth, to wit: (Set forth agreement *in haec verba*).

And thereafter, on, to wit, the day of, 19.., at, in the county aforesaid, the plaintiff and defendant made and entered into a certain other agreement in writing additional and supplemental to said agreement of, 19.., above set out, of which the following is a true copy, and thereby mutually undertook and promised as is therein set forth, to wit: (Set out agreement referred to).

And the plaintiff avers that after the execution of said contract and supplemental contract, and as full compliance therewith, it furnished and erected in the premises specified in said contract and supplemental contract, a refrigerating plant, and delivered the same to said defendant on or about the day of, 19.., at, in the county aforesaid; and that the said defendant then and there accepted the same as in compliance with said contract and supplemental contract, and is now using the same.

And the plaintiff further avers that after the delivery of said machinery by plaintiff at the premises of defendant, the defendant paid to the plaintiff on account thereof the sum of dollars, and that upon the acceptance of said refrigerating plant by the defendant as aforesaid, the defendant became indebted to the plaintiff for the balance of the purchase price of said refrigerating plant, as provided in said contract and supplemental contract, to wit, dollars; and being so indebted, the defendant then and there faithfully promised the said plaintiff well and truly to pay unto the said plaintiff the sum of money last mentioned, when the said defendant should be thereunto afterwards requested. (Add consolidated common counts) Nevertheless, etc.

1053 Mechanic's lien; subcontractor, action

A subcontractor may bring assumpsit against the owner and the contractor to enforce a mechanic's lien.⁹⁴

1054 Mechanic's lien, notice (Fla.)

To

Notice is hereby given you that I have performed labor upon your house, which was built on the hereinafter described lot, such labor consisting of (Set forth the nature of the labor); that said labor was performed for, contractor; that the amount due him for such labor is dollars and cents; that the lot referred to is (Describe property); and that I claim and intend to hold a lien on your house and lot mentioned for such labor performed and for said amount.

Dated, etc.

.....
(Character of workman)

Affidavit

(Venue)

Before the undersigned authority personally appeared, to me well known to be the person who signed the foregoing notice, and who, being duly sworn, says that the facts therein stated are true and that the sum of dollars and, cents stated therein to be due him on said account, is due, just and true and remains unpaid.

.....

Subscribed, etc.

(Illinois)

To (name owner)

You are hereby notified that I have been employed by (Name contractor) to (State nature of contract or work done, or to be done, or of what the claim is for), under his contract with you, on your property (Set forth substantial description) at, and that there was due me (or is to become due me therefor), the sum of dollars.

Dated at, this day of, 19..

.....⁹⁵

⁹⁴ Harty Bros. v. Polakow, 237 Ill. 559, 566, 567 (1909).

⁹⁵ Sec. 24, c. 82, Hurd's Stat. 1911, p. 1845.

1055 Mechanic's lien, Narr. (Fla.)

..... sues, as his contractor, for money due for labor performed and materials furnished for (Describe character of work), on the residence of said defendant, situate on lot (Describe property), the said work having been performed and the materials having been furnished during the year of, at the separate request of, as contractor, and of, as owner.

And the plaintiff prays the court for a judgment herein and that the said property, to wit: (Describe as before) be sold to satisfy his lien.

Bill of particulars

The following amounts are due, from, as his contractor, to wit:

Year	Name	Kind of work	Amount

1056 Money had and received, action

An action for money had and received is equitable in its nature and generally lies for money which the defendant ought to refund in justice and fair dealing (*Ex aequo et bono*).⁹⁶ Money which had been paid voluntarily under a mistake of law, or under a claim of right to the payment, with knowledge of the facts by the person making the payment cannot be recovered back on the ground that the claim was illegal, unless the payment had been made under a controlling necessity arising from the particular circumstances amounting to a compulsion.⁹⁷ Thus, money paid under protest to a party or a corporation who had no right to receive it and the payment was made to prevent injury to person, business or property of the payor;⁹⁸ money paid as the only means to recover possession of one's own property;⁹⁹ and

⁹⁶ Ward v. Bull, 1 Fla. 271, 278 (1847).

⁹⁷ Chicago v. McGovern, 226 Ill. 403, 406 (1907); Cook County v. Fairbank, 222 Ill. 578, 589 (1906); Illinois Glass Co. v. Chicago Telephone Co., 234 Ill. 535, 541 (1908).

⁹⁸ Chicago v. Northwestern Mutual Life Ins. Co., 218 Ill. 40, 44 (1905).

⁹⁹ Spaid's v. Barrett, 57 Ill. 289, 293 (1870).

money realized from the wrongful conversion and sale of personal property may be recovered back in this form of action.¹⁰⁰ To render the payment compulsory, the pressure brought to bear upon the person paying must have been such as to interfere with the free enjoyment of his rights of person or property, and the compulsion must have furnished the motive for the payment sought to be avoided.¹⁰¹

An action for money had and received is appropriate to compel a city to pay over a special assessment which has been levied and collected, and nothing remains to be done but to pay it;¹⁰² to recover back taxes which have been paid involuntarily upon a void assessment;¹⁰³ and to recover from the sheriff the surplus that belongs to a judgment debtor upon an execution sale and the satisfaction of the judgment.¹⁰⁴

A party who has a right of action *ex delicto* may waive the tort or wrong and sue in assumpsit for money had and received.¹⁰⁵

A partner cannot sue a co-partner in assumpsit for money advanced to him in furtherance of the partnership.¹⁰⁶

1057 Money had and received; insurance money received by factor, Narr. (Ill.)

For that whereas, heretofore, to wit, on the day of, 19.., the defendant.., w.. and from thence hitherto ha.. been engaged in the business of selling produce on commission at, to wit, in said county, and that afterwards, to wit, on the day and year last aforesaid, at, to wit, at said county, the plaintiff.. entered into an agreement in writing bearing date the day and year last aforesaid with the defendant.. under the style of, whereby the plaintiff.. promised to ship the defendant.., to wit, one or more carloads of, to wit,, and in consideration thereof the defendant.. promised to receive and sell the same for and on account

¹⁰⁰ *Watson v. Stever*, 25 Mich. 386, 387 (1872).

¹⁰¹ *Illinois Glass Co. v. Chicago Telephone Co.*, 234 Ill. 535, 543.

¹⁰² *Conway v. Chicago*, 237 Ill. 128, 135 (1908).

¹⁰³ *Nicodemus v. East Saginaw*, 25 Mich. 456, 458 (1872).

¹⁰⁴ *Commerce Vault Co. v. Barrett*, 222 Ill. 169, 176 (1906).

¹⁰⁵ *May v. Disconto Gesellschaft*, 211 Ill. 310, 315 (1904).

¹⁰⁶ *Hartzell v. Murray*, 224 Ill. 377 (1906).

of the plaintiff.. for a reasonable compensation to be paid by the plaintiff.. therefor and to keep said insured against loss or damage by fire for the benefit of plaintiff.., so long as said should be in the defendant.. possession and remain unsold.

And the plaintiff.. aver.. that relying upon the said promises of defendant.. the plaintiff.. afterwards, to wit, on the day of, 19.., shipped to the defendant.., under the style of, one earload of, to wit,, to wit, (Describe contents of ear), weighing in the aggregate, to wit, pounds, and that afterwards, to wit, on the day of, 19.., the plaintiff.. shipped to the defendant.., under the style of, an additional earload of, weighing in the aggregate, to wit, pounds; that the defendant.. afterwards, to wit, on the day and year last aforesaid received said and placed the same in storage in the name of, at, to wit, at the warehouse of the, to wit, at said county; that on, to wit, on the day of, 19.., there remained unsold and so as aforesaid stored in said warehouse and in possession of defendant.., to wit, pounds of said; that prior to the day and year last aforesaid the defendant.. had procured, to wit, divers insurance policies of insurance upon the said; and that on the day and year last aforesaid, and while the said policies of insurance were in full force, a fire occurred at said warehouse and damaged the goods of said plaintiff.. so stored as aforesaid; that the defendant.. then and there made claim upon the insurance companies that had issued said policies of insurance that said so as aforesaid in store in said warehouse was damaged by reason of said fire; that afterwards, to wit, on the day and year last aforesaid, the defendant.. made a settlement with said insurance companies for said damages to said so in storage as aforesaid and that said insurance companies then and there paid to the defendant.. as damages sustained by reason of said fire the sum of cents per pound upon each pound of said so in store at said warehouse and in possession of defendant.. at the time of said fire.

And plaintiff.. further aver.. that the defendant.. afterwards, to wit, on the day and year last aforesaid, sold the said for and on account of the plaintiff..; that said plaintiff.. ha.. paid to the defendant.. the full amount of the premium paid by the defendant.. for the said insurance on said and ha.. paid to the defendant.. the full compensation charged by the defendant.. for the sale of said and ha.. also paid to the defendant.. all other charges and expenses made or sustained by the defendant.. in and about the handling or selling the said..; yet, the defend-

ant.. ha.. neglected and refused and still neglect.. and refuse.. to pay to the plaintiff.. the said sum of money so collected and received by the defendant.., from the said insurance companies as damages sustained upon the said, the property of the plaintiff.., by reason of said fire, whereby the defendant.. became liable to pay to the plaintiff.. the sum of, to wit, dollars, and being so liable the defendant.. then and there promised the plaintiff.. to pay ..h.. the same when ..he.. should be thereto afterwards requested. Nevertheless, etc.

1058 Money had and received; purchase price under rescinded contract, Narr. (Ill.)

For that whereas, on the day of, 19.., in the county aforesaid, the defendant entered into a contract in writing with the plaintiff in the words and figures following, to wit: (Set out contract).

And the plaintiff avers that he then and there paid to the defendant the sum of (\$.....) dollars pursuant to the terms of said contract; that afterwards, the said defendant delivered to the plaintiff an abstract of title of said described land as a true and correct abstract of title to said land, and assured plaintiff that said abstract contained a true and correct history of the source, nature and condition of defendant's title to said land at the time said abstract was delivered, upon which said abstract plaintiff might safely and solely rely to ascertain the source, nature, condition and sufficiency of defendant's title to said land and defendant's right and ability to convey and assure under said contract to plaintiff by a good and sufficient warranty deed said described land in fee simple clear of all incumbrances whatsoever; that plaintiff received said abstract for examination and relied on the contents and representations thereof; that an examination of said abstract disclosed clouds and incumbrances on and over said title as follows, to wit:

The patent from the United States government to said land was granted, 1...., to J, M, J J, D and K; that subsequently thereto, D, L D pretend to convey said described lands to parties through whom defendant derives title, no conveyance by the original patentees being shown by said abstract and no sufficient evidence being disclosed that the said grantors and the said patentees were identical; that said M died prior to, 19.., without probate of his estate and proof of heirship, and said abstract does not show that all the heirs of said M conveyed the interest of said M, deceased, to any one in the chain of title through which defendant pretends to have acquired title; that documents numbers, and of said abstract show a partition proceeding attempted to be made by the heirs of one P, to whom title is pretended to have passed,

one of said heirs named P being a minor, over whom the court entertaining said partition proceeding had no jurisdiction and whose rights and interests in said described land were not by said proceeding concluded and who is not by said proceeding bound; that said abstract does not disclose the heirs of said P, and that the title to said described land is subject to the rights of any person who may be shown to be the heir of P, other than those mentioned in said partition proceeding; that the court in said proceeding had no right or authority to order a sale of said described land, and the rights of the heirs of said P were not by the sale in said proceeding ordered concluded; that said abstract shows a mortgage of said described land in the state of, which said mortgage is not by due authority canceled and released; that in said partition proceeding a sale of the said described land was made by one without any authority from the court ordering said sale, the person by said court appointed to make said conveyance being known and described as; and that said described property was then and there subject to the rights of parties then and there in possession, the names of whom are to plaintiff unknown.

Plaintiff further avers that there was then and there in full force and effect in the state of, and continued to be in full force and effect until the commencement of this suit, the following law, to wit: (Set out statute).

And the plaintiff further avers, that afterwards, to wit, on and after the day of, 19.., he, the said plaintiff, was ready and willing, and offered to execute and deliver to the said defendant a trust deed upon said described property securing the payment of the sum of (\$.....) dollars, due in years from the date thereof, with interest at the rate of per cent per annum, payable semi-annually, on the whole sum remaining unpaid, and to pay all taxes, assessments or impositions that may be legally levied or imposed upon said land subsequent to the year 19..; that the said defendant was then and there informed of the above mentioned defects, clouds and incumbrances upon said title; that by reason of said clouds, incumbrances and defects in said title, and the operation of the statute law of the state of, said defects, clouds and incumbrances were then and there subsisting clouds and incumbrances upon said title; that the defendant was then and there unable to convey and assure to the plaintiff in fee simple clear of all incumbrances whatever, by a good and sufficient warranty deed, the said described piece and parcel of land, though requested so to do by the plaintiff; and that thereupon the plaintiff rescinded said contract; and that the defendant then and there by reason of said premises became and was indebted to the plaintiff in the sum of (\$.....) dollars theretofore paid by the plaintiff to the defendant as aforesaid; and being so indebted,

the defendant, in consideration thereof, then and there promised to pay him the said sum of money on request. Yet the defendant, though requested, has not paid the same or any part thereof, but refuses so to do; to the damage of the plaintiff in the sum of (\$.....) dollars, and therefore, he brings his suit, etc.¹⁰⁷ (Add money counts)

1059 Money stolen, Narr. (Md.)

For that the defendant is indebted to the plaintiff in the sum of \$....., for moneys stolen by the defendant from the plaintiff while he, the said defendant, was a clerk in the office of the, and acting as such in the said office of the, and in the employment of the plaintiff as such, which said \$..... at the time of such theft, as aforesaid, by the defendant, was the property of the plaintiff, and which said property and money, so stolen by the defendant as alleged, the defendant has taken away and appropriated to his own use and refuses and has refused and still refuses to pay the same to the plaintiff.

And the plaintiff claims \$.....

1060 Paving under viaduct, action

In the absence of contract, a municipality, under its police power, cannot require a railway company to re-pave, re-curve and re-sidewalk a subway constructed by the railway company under its charter by the elevation of its tracks. Neither is it within the power of the municipality, under its general authority to compel railways to construct and maintain proper crossings at streets, alleys and highways, or to maintain viaducts with proper approaches thereto, to force a railway company to re-pave, etc., approaches to a viaduct which are not legal approaches thereto. Ordinarily an "approach" is considered a part of the viaduct. Its determination, however, depends upon what would be reasonable under the circumstances and the local situation in each case. The filling of some of the approaches to a viaduct permanently, the full width of the street, resulting in a mere raising of the street grade constitutes no part of the viaduct or its approaches.¹⁰⁸

1061 Performance prevented, Narr. (Va.)

For this, to wit, that heretofore, to wit, on the day of, at the, in the county of

¹⁰⁷ Eggers v. Busch, 154 Ill. 604 (1895).

¹⁰⁸ Chicago v. Pittsburgh, Ft. W. & C. Ry. Co., 247 Ill. 319 (1910).

....., by a certain agreement then and there made between the said plaintiff and the said defendant, the said plaintiff agreed to construct and complete a certain barge, furnishing all the materials and labor in the construction of the same, the said barge to be of the dimensions of feet and feet in depth, and it was further agreed that said barge was to be completed in days from the time of its commencement; it was also then and there agreed between the said plaintiff and the said defendant, that he, the said defendant, would pay unto the said plaintiff, upon the completion of the said barge the full sum of dollars. And the said agreement being so made, afterwards, to wit, on the day, month and year first above written, in consideration thereof, and that the said plaintiff, at the special instance and request of the said defendant had then and there undertaken and faithfully promised the said defendant to perform and fulfill the said agreement in all things on the said plaintiff's part and behalf to be performed and fulfilled, he, the said defendant undertook and then and there faithfully promised the said plaintiff to perform and fulfill the said agreement in all things on said defendant's part and behalf to be performed and fulfilled. And the said plaintiff had always from the time of the making of the said agreement, performed and fulfilled all things on his part and behalf in the said agreement to be performed and fulfilled, and did afterwards, to wit, on the day of, enter upon and commence the said work, and for that purpose did procure and find all materials and labor necessary for performing same, and did the same in part, and hath always been ready and willing to perform and complete the whole of said work in pursuance of the said agreement; of all which premises the said defendant hath notice.

Yet, the said plaintiff in fact sayeth that the said defendant contriving and wrongfully intending to injure said plaintiff, did not nor would, perform said agreement, nor his said promise and undertaking, and wholly disregarded the said agreement and said promise and undertaking; and afterwards, to wit, on the day of, did not, nor would, permit or suffer the said plaintiff to proceed to complete the said work and then and there wholly hindered and prevented him from so doing, and then and there wrongfully discharged the said plaintiff from any further performance or completion of his said agreement and promise and undertaking; whereby the said plaintiff hath lost and been deprived of profits and advantages, which he otherwise might and would have derived from the completion of said work; and although often requested, said defendant has not paid to said plaintiff the money that is due him under the terms of said contract, or any part thereof, to the plaintiff's damage in the sum of dollars; and therefore, he brings this suit, etc.

1062 Personal injuries, action

Assumpsit, and not case, is the appropriate remedy against the principals and their sureties to recover damages for personal injuries resulting to a party from a breach of any of the conditions of a contractors' bond.¹⁰⁹

1063 Personal injuries; sidewalk injury, Narr. (Mich.)

For that whereas, heretofore, to wit, on the day of, 19.., the said defendants by their writing obligatory, bearing date the day and year aforesaid, acknowledged themselves to be held and firmly bound unto the city of, a municipal corporation in said county of, in the sum of dollars, lawful money of the United States, to the payment of which, well and truly to be made, they bound themselves and each of their heirs, executors, administrators and assigns jointly and severally. And in said writing obligatory it was expressly set forth that whereas, the above bounden desired to engage in the business of laying stone or cement sidewalks, cross-walks or curbs in the city of; and whereas, the common council of the said city, in pursuance of the authority conferred upon it to regulate the construction of sidewalks, cross-walks and curbs, did at the regular meeting held on the day of, 19.., adopt the following resolution: (Set out resolution).

And the said writing obligatory was upon the express condition that if the said shall construct and lay all such stone or cement sidewalks, cross-walks, or curbs, laid by them in said city, of first class material, in good and workmanlike manner, upon and along grades furnished and established by the board of public works, and shall keep the same in good repair for a period of years from and after the date of said instrument, and shall properly support and protect all the retaining walls upon the land abutting and adjoining where said walks may be laid, so as to prevent injury thereto by reason of the construction of any such walks and curbs, and shall in all things abide by the rules and regulations made by the said board of public works governing the construction of said walks, cross-walks or curbs in said city, and shall also protect and save the said city of, free and harmless from all loss or damage caused by said, in and about the construction of said sidewalks, and shall indemnify, protect and save harmless all persons mentioned in the above resolution, and for whose benefit said bond was given, said bond being given in pursuance of and in compliance with the terms of said

¹⁰⁹ Cox v. Fidelity & Deposit Co.,
157 Mich. 59, 64, 65 (1909).

resolution, then said bond or obligation to be void, otherwise to remain in full force and effect. The plaintiff avers that said writing obligatory which was by the said defendants duly signed and sealed, was delivered and filed with the board of public works of said city of, and became from thence and thereafter a valid and substantial obligation upon the part of said defendant.

And plaintiff avers that at the time of the making and filing of said writing obligatory as aforesaid, the said defendants contemplated the construction of a certain sidewalk in street, a legally constituted highway in said city of on the side thereof, for the, a corporation, by contract with said company, along the property of said company, in said city of; that thereafter the said defendants, did enter upon the construction of said cement sidewalk at the place aforesaid, and did construct the same for said, under contract with it; and that to protect said cement sidewalk after same was constructed as aforesaid, the said defendants did place a certain wire netting across the said sidewalk at or near the place where the said cement sidewalk joined it, or was connected with another sidewalk in said street, and which in connection with said sidewalk formed a continuous walk along the side of said street at the place aforesaid.

The plaintiff further avers that among the rules and regulations of the board of public works of said city of, at the time of the construction of said sidewalk aforesaid, and the erection of the barrier aforesaid, was a rule and regulation that barriers erected as aforesaid to protect said walks as aforesaid should be of sufficient height to prevent persons using said sidewalks from walking into said cement sidewalks and from falling over said barriers, and that at the same time said board of public works had another rule or regulation that in the night all barriers erected as aforesaid should be properly protected by light or lamp.

And the plaintiff avers, that, to wit, at the time and place aforesaid, it was the duty of the said defendants to erect and maintain a barrier, at the place aforesaid, of sufficient height so as to prevent persons from walking on said walk or falling over said barrier, and that at the said time and place it was also the duty of said defendants to have a light or lamp in the night time at or near said barrier so that the same might be seen and so as to prevent any person from colliding therewith.

But the plaintiff avers that contrary to the duty of said, as aforesaid, to wit, on the day of, 19.., and, to wit, for days prior thereto, the said had permitted said wire barrier to be and remain in a fallen down condition at the place aforesaid,

thereby failing to prevent a person from walking on said cement sidewalk or from stumbling over the same; and, to wit, on said day of, 19.., in the night time of said day, said had utterly neglected and failed to provide any light or lamp at or about the barrier aforesaid, so that the same might be seen; and that by reason of the premises, the plaintiff who on the day and year aforesaid, in the night time of said day, at about the hour of noon, was lawfully proceeding along said street on the sidewalk thereof, towards said cement sidewalk, without any fault or negligence upon part, because of the absence aforesaid of a light or lamp at the place aforesaid, and because of the fallen down condition of said wire barrier, as aforesaid, the said plaintiff, stumbled over said wire barrier without seeing the same and was by the said wire barrier thrown violently down upon the said cement sidewalk. By reason of which ..h.. sustained severe injury to head, right shoulder, right arm and side, and right elbow and wrist, and right knee, and the same became bruised, lame, sore, wrenched and strained, and ..h.. whole system was badly shocked, and by reason of which ..h.. became sick, sore, lame and disordered and unable to helpself or to pursue ..h.. ordinary avocation which was that of, by means of which avocation ..h.. was enabled to earn and did earn large sums of money, to wit, dollars per month; and has so remained, to wit, from thence hitherto; and that by reason of the premises, the plaintiff has been caused to suffer pain and anguish of body and mind, and will in the future be caused to suffer great pain and mental and bodily anguish; that the plaintiff has been caused to spend large sums for physicians and medicine in and about endeavoring to be cured of the injuries aforesaid, and ..h.. has suffered injury in all to the amount of dollars.

And plaintiff says that by reason of the premises an action hath accrued to ..h.. to have and demand of and from the said defendants, under the writing obligatory aforesaid the damages aforesaid, and that by reason of the premises the said defendants have promised to pay to, the said plaintiff, the damages aforesaid, whenever thereunto requested; but the plaintiff says that although often requested so to do, the said defendants have neglected and refused and still do neglect and refuse to pay said plaintiff the said damages so sustained by ..h.. as aforesaid, to the damage, etc.

1064 Personal injuries; street car collision, Narr. (Ill.)

For that whereas, before and at the time of the making of their promises and undertakings hereinafter next mentioned, said defendants were in the use, control and management, as

receivers aforesaid, of divers lines of street railway in the city of, county of, and state of Illinois, which were operated prior to said order in the name of said, and by it, together with certain cars, machinery, powerhouses, and other devices and instrumentalities used by them, and in their use, control and management, for the purpose of operating street railways in the city of, and conducting the business of a common carrier of passengers for hire, and in that regard of propelling along certain tracks in the city of, divers cars for the accommodation of persons and for the purpose of carrying persons to and from divers parts of the city of, for hire and reward to the said defendants, in that behalf paid.

And the plaintiff avers that on, to wit,, 19..., in consideration that the said plaintiff, at the special instance and request of the said defendants, would take and engage a certain street car, then and thereon, to wit, the said day, in the use, control and management of said defendants, under said order and operated by them in street in Illinois, to be carried and conveyed in said street car by said defendants so operating, controlling and managing the same, from, to wit, avenue, a certain street in the city of, to, to wit, another certain street in the city of, known as avenue at and for certain reasonable hire and reward, to wit, the sum of cents to be therefor paid by the said plaintiff to the said defendants in that behalf, they, the said defendants, then and there undertook and faithfully promised said plaintiff to safely carry and convey said plaintiff in the said street car from, to wit, avenue to, to wit, avenue in the city of, and to use due care and diligence in and about the safe carrying and conveying of the plaintiff, as aforesaid.

And the plaintiff in fact says that she, confiding in the aforesaid promise and undertaking of the said defendants to safely carry her in said car, as aforesaid, did, afterwards, to wit, on the same, at, to wit, in the county of, and state of Illinois, become a passenger upon said certain car then and there in the use, control and management of said defendants under said order, that is to say, a certain car managed, controlled and then and there propelled by them on a certain line of street railway lying in said street and in the use, possession and management of the said defendants under said order. And the plaintiff did, so confiding in the said promise, take and engage transportation in the said car to be carried and conveyed in and by the said car to wit, avenue to, to wit, avenue in said street in the city of, and did then and there pay to the said defendants the sum of cents; the same being the hire and reward requested by said defendants for the carriage of the plaintiff upon said car from said,

to wit, avenue to, to wit, avenue in the city of

And although the plaintiff confiding in the said promise and undertaking of the said defendants, did afterwards, to wit, on the day and year aforesaid, to wit, aforesaid, become and was such passenger in and by the said street car, operated, controlled, and managed in said street, by the defendants, to be carried and conveyed in and by the same from said avenue to said avenue; yet, the said defendants not regarding their said promise and undertaking so by them made in manner and form aforesaid, did not nor would use due and proper care, skill and diligence in and about the carrying and conveying of the said plaintiff in and by the said street car from said avenue to said avenue; but then and there wholly neglected and refused so to do, and on the contrary thereof so carelessly, improperly, negligently and unskillfully drove and managed a certain other street car then and there in the like use, control and management of the said defendants under said order and being then and there operated by said defendants upon said line of street railway lying then and there in street, that by reason thereof said street car last mentioned collided with the said street car upon which the plaintiff was then and there a passenger, near, to wit, street, in the city of, county and state aforesaid, and on the day and year aforesaid.

By and through the carelessness, negligence, unskillfulness and misconduct of the said defendants, in the management of said cars and in thereby causing said collision as aforesaid, and while the plaintiff was then and there in the exercise of due care and caution for her own safety, and was then and there in the act of alighting from said car, and in that behalf was in the exercise of due care and caution for her own safety, the plaintiff was thrown from the said car upon which she was then and there a passenger, to and upon the ground then and there, and by reason thereof, and the said several premises, the plaintiff's left humerus and lower end of the plaintiff's left radius were fractured. And the plaintiff sustained thereby and by reason thereof a great shock and was then and there in other respects and thereby greatly hurt, bruised, and was sick, sore, lame and disabled in consequence of said several premises, and so remained and continued for a long space of time, to wit, from thence hitherto. During all of which time she, the said plaintiff, and in consequence of said injuries, suffered and underwent great pain and was hindered and prevented from performing and transacting her necessary affairs and business, by her during that time to be performed and transacted. And also thereby, she the said plaintiff, was forced and obliged to, and did, necessarily lay out and expend a large sum of money, to wit, the sum of dollars in and about endeavoring

to be cured of the said fractures, bruises, wounds, sickness, soreness, lameness and disorders aforesaid, occasioned as aforesaid, at the place aforesaid.

And the plaintiff avers that by reason of the injuries sustained as aforesaid she has become permanently injured and that she has suffered permanent injury in the use of her left arm, and in consequence of the said injuries has suffered from an attack of neurasthenia and has become and is permanently impaired in her health and physical well being. To the damage, etc.

1065 Preference by bankrupt, Narr. (Ill.)

For that whereas, on, to wit, the day of, 19.., there was filed in the court of the United States for the district of, division, a petition in bankruptcy against the said K, and on, to wit, the day of, 19.., it was therein adjudged a bankrupt, and on, to wit, the day of, 19.., plaintiff was appointed trustee of the estate in bankruptcy of the said bankrupt, and duly qualified as such, and is still acting as such.

Further this plaintiff avers that within four months prior to the date of the said filing of said petition, and upon, to wit, the day of, 19.., there was transferred to the defendant from the then estate of the said bankrupt sundry items of assets, to wit, shares of stock, notes, and choses in action, to the amount of, to wit, (\$.....) dollars, upon pre-existing indebtedness then due to the said defendant from the said K; that at the time of said transfer the said K was insolvent and unable to continue its business; that at and throughout the time of the making of said transfer the said defendant was himself president and director of said company; that said defendant when receiving said assets had reasonable cause to believe and did believe that it was intended thereby to give to him, the defendant, a preference; that said K then owed fully dollars to sundry and divers of its creditors, other than the said defendant, no part of which has ever been paid; and that by the fact of the said transfer the said defendant was enabled to obtain a greater percentage of his said debt than any other of the said bankrupt's then creditors of the same class with the said defendant.

Further this plaintiff says that upon, to wit, the day of, and within a year of the date of the filing of the said petition, this plaintiff notified the said defendant of this plaintiff's election to rescind said transfer, and did demand from the said defendant the return of the said assets, or if they were disposed of, then the return of their proceeds; by reason of which premises the defendant then and there undertook and promised to make such return, etc., but, although

often requested, has failed and refused so to do, and has become indebted to this plaintiff in the sum last aforesaid: and for this plaintiff brings suit, etc.

(Mississippi)

For that whereas on day of, 19.., a petition in bankruptcy was filed in the Federal court at, against by his creditors, petitioning that the said be, by said court, declared a bankrupt, and that on the day of, 19..; the said was by said court duly declared a bankrupt, and that the said plaintiff by the court in said bankruptcy proceedings was duly declared a trustee; that thereafter, in due time and form, plaintiff became trustee, qualifying as such and giving bond as is required in such matters.

That prior to such bankruptcy proceedings and within four months thereof the said, being indebted to said defendant and other persons, and the said, knowing himself to be insolvent, turned over dollars in cash, then belonging to himself, to said defendant, with the intent and purpose to favor said defendant and to give said defendant a preference over said and other creditors of the same class.

That at the time of the delivery of said cash to said defendant by said the said and the said defendant knew of the insolvent condition of the said and that the said defendant received the said sum of money knowing that at the time that he received a greater per cent of his indebtedness than would be received by any other creditor of the same class of the said, and that the said defendant knew at the time of such delivery, that it was intended by said to prefer and favor the said defendant above any other of said creditor of said

That by the payment and delivery of said money by the said to said defendant for the purpose and intent aforesaid, an action has accrued to the plaintiff for said amount.

1066 Professional services rendered in another state, action

A physician may recover for medical services rendered to a patient who is temporarily in another state, under a license to practice in Illinois.¹¹⁰

1067 Profits, Narr. (Ill.)

For that whereas, heretofore, on, to wit, day of, 19.., the defendant entered into a certain

¹¹⁰ Ziegler v. Illinois Trust & Savings Bank, 245 Ill. 180, 198 (1910).

agreement in writing for a good and valuable consideration, to wit, the assignment of all the plaintiff's interests in a certain lease of the premises known as the, in the county aforesaid, dated, 19., for a term of years, at a gross rental of (\$.....) dollars, whereby he agreed that the plaintiff should have per cent of the net profits of said theatre during the term of years after the date of said lease, to be accounted and paid over at the end of each and every theatrical season, to wit, day of, of each year; and the plaintiff alleges that said theatre has made large profits since the day of, 19., up to the commencement of this suit; and that estimating upon the large business done and profits made up to this time, the plaintiff would be entitled to a large amount, to wit, upwards of (\$.....) dollars, as his share in the future profits of said theatre for the remaining term of his said contract. But that the defendant, though often requested heretofore, has refused and at present does refuse wholly to account for or to pay over any of the profits or any portion of plaintiff's share therein up to the present time, or to recognize any rights of the plaintiff under said contract to any of the future profits of said business; to the damage of the plaintiff of dollars, and therefore, he brings this suit, etc.

(Mississippi)

For that whereas, on the day of, 19., the plaintiff was the manager and director of a theatrical troupe known as and the defendant was on said date one of the owners of the house in the city of,, and on the date aforesaid the said plaintiff and defendant entered into a contract, whereby the plaintiff obligated himself to furnish (State who and in what play) and to furnish all transportation, express, freight, and baggage charges for his company, and advance printing, lithographs, etc.; and the defendant obligated himself to furnish said house well lighted, cleaned and heated, with all the requisite attaches both in rear and before the curtain, included, etc., for a period of one night and one matinee performance commencing; that the said contract further provided, as a consideration therefor, that the plaintiff was to receive per cent of the gross receipts of each and every performance, and the remainder, or per cent, the defendant was to receive as his share of the earnings; all of which agreement will more fully appear by reference to a copy of said written contract herewith filed, marked exhibit "A" and made a part of this declaration.

That pursuant to said contract, the plaintiff furnished (State who and in what play) at said house in the city

of, on, in performance; that he in all things kept and performed said contract on his part; but he alleges that the defendant failed and refused, and still fails and refuses, to keep and perform the same on his part, as hereinafter stated.

The plaintiff avers that the per cent of said gross receipts of each and every one of said performance due him by said defendant amounts to dollars, as more fully appears by a sworn supplemental answer of the defendant or his agent as manager, herewith filed marked exhibit "B" and made a part hereof.

That by means whereof the said defendant then and there undertook and promised to pay plaintiff, or his order, said sum of dollars whenever he should be thereunto afterwards requested so to do.

Yet, plaintiff avers that though requested, the said defendant has wholly failed and refused and still fails and refuses to pay him, or to pay to his said order, and sum of money, or any part thereof, to the damage, etc.

1068 Promise to marry, Narr. (Ill.)

For that whereas, heretofore, on to wit, the day of, 19.., at, to wit, the county aforesaid, in consideration that the said plaintiff, being then and there unmarried, at the special instance and request of the said defendant, had then and there undertaken and faithfully promised the said defendant to marry him, the said defendant, he, the said defendant, undertook, and then and there faithfully promised the said plaintiff to marry her, the said plaintiff, in a reasonable time next following; and the said plaintiff avers that she, confiding in the said last mentioned promise and undertaking of the said defendant, hath always hitherto remained, continued, and still is sole and unmarried.

And plaintiff avers that after making of said promise and undertaking to marry plaintiff as aforesaid, the said defendant, contriving and fraudulently intending, craftily and subtly to deceive and injure the plaintiff, and to wantonly corrupt her, the plaintiff, to his base passions and licentious use, he, the said defendant, on, to wit, the day of 19.., at, to wit, the county aforesaid, did wrongfully and wickedly seduce her, the said plaintiff, and have sexual intercourse with said plaintiff, and did then and there cause her to become pregnant with child by him, the said defendant. And that after she so became pregnant, as aforesaid by him, the said defendant, she, the said plaintiff, still confidently relying upon and believing in the promise and undertaking of the said defendant to marry her, the plaintiff as aforesaid, solicited and requested him, the said defendant, to forthwith marry her, the said plaintiff, and the said defendant, still further contriving

to deceive her, the plaintiff, told plaintiff that if she would accompany him to the city of, at, to wit, the county of, and state of, he, the said defendant, would then and there marry her; and still relying upon the faithfulness of the said defendant, said plaintiff did then and there, on, to wit, the day of, 19.., go with him, the said defendant, to, as aforesaid, and then and there said plaintiff requested said defendant to marry her, the said plaintiff.

And plaintiff avers that thereafter, on, to wit, the day of, 19.., and at divers times since that time, at, to wit, the county of aforesaid, she, the said plaintiff, has repeatedly requested said defendant to marry her, the said plaintiff, as aforesaid; yet, the said defendant, further contriving and fraudulently and craftily intending to deceive and injure the said plaintiff, after the making of said promise to marry her, as aforesaid, did designedly, wrongfully and injuriously, on, to wit, the day of, 19.., at, to wit, the city of, in the county of, and state of, marry a certain other person, to wit, one, contrary to his promise to marry the plaintiff as aforesaid.

Wherefore, the said plaintiff saith that she is injured and hath sustained damages to the amount of dollars. and therefore she brings suit, etc.

1069 Promissory notes, consideration

A promissory note given without consideration and received by the payee under an agreement never to call upon the maker to pay it is invalid and unenforceable in the hands of the payee.¹¹¹

1070 Promissory notes, negotiability

A promissory note is negotiable if it expresses a promise by one person to another person therein named, or to his order, to pay a fixed sum of money at a specified time, unconditionally, before maturity.¹¹² The question of the negotiability of a promissory note arises only before maturity. After a promissory note is due its negotiability is at an end.¹¹³

¹¹¹ *Straus v. Citizens State Bank*, 254 Ill. 185, 187 (1912).

¹¹² *Stitzel v. Miller*, 250 Ill. 72, 75 (1911).

¹¹³ *Stitzel v. Miller*, *supra*.

1071 Promissory notes; parties, plaintiffs

The payee alone can sue on a promissory note which has not been assigned.¹¹⁴ In case of death of a payee an action upon the note should be brought in the name of the administrator or personal representative.¹¹⁵ The purchaser of a negotiable instrument which is duly endorsed by the payee, may maintain an action thereon in his own name.¹¹⁶

The holder of a negotiable instrument made payable and endorsed to a fictitious person or bearer may bring suit in his own name, regardless of whether the maker of the instrument knew that it was so endorsed.¹¹⁷

1072 Promissory notes; parties, defendants

All, or any number, of the parties on a promissory note may be sued, under the Illinois Negotiable Instrument act, in one action, either as makers or endorsers.¹¹⁸

1073 Promissory notes; declaration, requisites

In an action upon a promissory note, payable at a specified place, the averment of a demand is unnecessary.¹¹⁹ Nor is it necessary to allege the particular consideration for which the note was given, although the consideration is mentioned in the note.¹²⁰ The date of a promissory note is matter of essential description and must be precisely alleged and proved.¹²¹ Several promissory notes constituting similar causes of action may be joined in one count.¹²²

1074 Promissory notes; indorsee v. indorser, Narr. (Ill.)

For that whereas P, on the day of, 19.., at in said county, made his certain promissory note in writing, bearing date the day and year aforesaid, whereby he then and there promised to pay to the order of said D (\$.....) dollars, days after the

¹¹⁴ Newman v. Ravenscroft, 67 Ill. 496, 497 (1873).

¹¹⁵ Newhall v. Turney, 14 Ill. 338, 339, 341 (1853).

¹¹⁶ Stitzel v. Miller, *supra*.

¹¹⁷ Keenan v. Blue, 240 Ill. 177, 188 (1909).

¹¹⁸ First National Bank v. Miller, 235 Ill. 135, 137 (1908).

¹¹⁹ Hannibal & St. Joseph R. Co., 102 Ill. 249, 259 (1882); Butterfield v. Kinzie, 1 Seam. 445 (1838).

¹²⁰ Gaddy v. McCleave, 59 Ill. 182, 184 (1871).

¹²¹ Streeter v. Streeter, 43 Ill. 155, 158 (1867).

¹²² Godfrey v. Buckmaster, 1 Seam. 447, 450 (1838).

date of said note, at avenue, in the said city of , with interest at per cent (....%) per annum, for value received, and then and there delivered the said promissory note to the said defendant, and the said defendant, D, then and there endorsed the said note in writing and delivered it to the plaintiff; and the plaintiff avers that afterwards, to wit, on the day of , 19.., the said promissory note having become due and remaining wholly unpaid, the said plaintiff instituted a suit on the said note against the said P, in the court of county, in the state of , to the , 19.. term thereof. And afterwards at the said term of said court, 19.., to wit, on the day of , 19.., the said plaintiff recovered a judgment in said court against the said P for the sum of (\$.....) dollars, damages, and (\$.....) dollars, costs of said suit.

And the plaintiff further avers that afterwards, to wit, on the day of , 19.., he caused to be issued in the office of the clerk of said court of county a writ of *fieri facias* directed to the sheriff of said county of , in which the said P resided, commanding him that of the lands and tenements, goods and chattels of said P he cause to be made the sum of (\$.....) dollars damages aforesaid, with interest thereon from the date of the rendition of said judgment, and also the costs aforesaid, and that he have that money at the clerk's office aforesaid in days from the date of said writ, to render to the plaintiff; which writ was afterwards, to wit, on the day of , 19.., delivered to the sheriff of the county of , and on the day of , 19.., the said sheriff made due return of said writ in the office of the clerk of said court with his return thereon endorsed to the effect that he, the said sheriff, could find no property wherewith to satisfy the said writ, or any part thereof, and therefore returned the same wholly unsatisfied; as by the records and proceedings in said suit in said court remaining will more fully appear. And the said plaintiff avers that he used due diligence by the institution and prosecution of said suit against the said P, the maker of said note.

By means whereof and by force of the statute in such case made and provided, the said defendant became liable to pay to the plaintiff the sum of money in said note specified; and being so liable, in consideration thereof, afterwards, to wit, on the day and year last aforesaid, at the place aforesaid promised the plaintiff to pay him the said sum of money in the said note specified when thereunto afterwards requested.

2. And whereas also P, on the day of , 19.., at , in said county, made his certain other promissory note in writing bearing date the day and year last

aforesaid, whereby he then and there promised to pay to the order of D, (\$.....) dollars, at avenue, with interest at per cent (....%) per annum, days after the date thereof, for value received, and then and there delivered the said promissory note to the said defendant, and the said defendant, D, then and there endorsed the said note in writing and delivered it so endorsed to the plaintiff; and the plaintiff avers that when said promissory note became due and payable the said P had become and was wholly insolvent and unable to pay the amount of said note, or any part thereof, and hitherto from thence has continued insolvent and has not paid the amount of said note, or any part thereof, to the plaintiff. And the plaintiff avers that it is and has been impossible at any time since the said note became due and payable to collect the same or any part thereof by legal proceedings against the said P, and that any such legal proceedings at any time since the maturity of said note would have been wholly unavailing.

By means whereof and by force of the statute in such case made and provided the said defendant became liable to pay to the plaintiff the sum of money in said note specified, and being so liable, in consideration thereof, afterwards, to wit, on the day and year last aforesaid, at the place aforesaid, promised the plaintiff to pay him the said sum of money in the said note specified when thereunto afterwards requested.

Yet, the said defendant, not regarding his said promises and undertakings, but contriving, etc, and although often thereto requested, has not paid said plaintiff said sums of money, or any part thereof, but has hitherto wholly refused and neglected so to do, and still does so refuse and neglect, to the damage of said plaintiff, as he says, of dollars, and therefore he brings his suit, etc.

1075 Promissory notes; indorsee v. maker, Narr. (District of Columbia)

For that heretofore, to wit, made their certain promissory note, dated, now overdue and thereby promised to pay to the order of the defendant by the name of dollars, days after date, value received with interest at per cent per annum. That said payee for value, before the maturity of said promissory note and in the usual course of business endorsed and delivered the same to the plaintiffs. That said note was duly presented for payment, but was dishonored and protested; and the plaintiff claims the sum of dollars with interest at the rate of per cent per annum from the day of, and costs of protest, besides costs of this suit.

Affidavit

(Venue)

I,, being first duly sworn do upon oath depose and say that I am a member of the firm of and copartners trading and doing business under the firm name and style of who are the persons named as plaintiffs in the annexed declaration, which is hereby referred to and made a part of this affidavit. That said copartners trading as aforesaid, have a cause of action against, who is named as defendant in said annexed declaration. That said cause of action is based upon a certain promissory note bearing date and signed and payable to the order of for the sum of payable days after date, at value received, interest at That before maturity said promissory note was endorsed by the payee, to the plaintiffs, who are the *bona fide* holders for value. That at maturity of said note the same was presented for payment by the plaintiffs, but the defendant did not pay the same, and said note was dishonored and protested, and no part of said note has been paid. And that there is justly due and owing the plaintiffs from said defendant, the sum of dollars and dollars costs of protest with interest as claimed in said annexed declaration, exclusive of all set offs and just grounds of defense.

Subscribed, etc.

.....,

(Florida)

For that the defendant on the day of, 19.., by his certain promissory note now overdue promised to pay to the order of, months after date, dollars with interest at the rate of per cent per annum from date; and said, endorsed the said note to the plaintiff; and that the defendant has not paid the same. And plaintiff claims dollars.

(Illinois)

For that the said defendant heretofore, to wit, on the day of, 19.., at and within the county and state aforesaid, made his certain note, in writing, of that date thereby, by name of promising to pay to the order of (by the name of), at the office of in the city of, Illinois, the sum of dollars, months after date thereof, for value received. And the said, by his signature, in writing, on the back of said note, afterward,

on the same day (signed) ordered and assigned said note to be paid to the plaintiff, of which defendant had notice.¹²³

Yet, the said defendant, his promise aforesaid not regarding, hath not paid said note, nor the sum of money therein specified, either at the office of the said in the city of aforesaid, nor to the said plaintiff, although the time specified in said note for the payment thereof hath long since elapsed; but to pay the same or any part thereof, hath hitherto refused, and still doth refuse, to the damage, etc.

(Maryland)

..... by his attorneys, sues, for money payable by the defendants to the plaintiff.

And for that the said defendants on the day of, 19.., by their promissory note now over due promised to pay to, or bearer, \$....., years after date, and that the said endorsed the same to the plaintiff, as follows:, trading as per, and the said note was duly presented for payment and was dishonored, whereof the defendants had due notice, but did not pay the same.

And the plaintiff claims \$.....

1076 Promissory notes; payee v. maker, Narr. (Ill.)

For that whereas, at to wit, at the county aforesaid, on the day of, 19.., the said defendants made their certain promissory notes, in writing, and thereto subscribed their proper hand writings, the date whereof is the day and year aforesaid, by one of which said promissory notes, the said defendants on or before the day of, then next, promised to pay to the order of, dollars, for value received, with interest at the rate of per centum per annum after due and payable. By another of said promissory notes, the said defendants on or before the day of, then next, promised to pay to the order of, dollars, for value received with interest at the rate of per centum per annum, from the said day of, 19... (Aver similarly for each subsequent note)

¹²³ A declaration on an assigned promissory note must aver an endorsement upon the note. *Keeler v. Campbell*, 24 Ill. 288 (1860). The averment of delivery of the promissory note is immaterial and may be omitted where there is an averment that the payee endorsed the note to the plaintiff, as an endorsement im-

plies delivery, notwithstanding the fact that precedents contain such an averment. *Chester & Tamaroa Coal & R. Co.*, 72 Ill. 521, 523 (1874). The declaration need not aver that the note is held by the plaintiff for the use of another. *Zimmerman v. Wead*, 18 Ill. 304 (1857).

Nevertheless, not regarding the several promises and undertakings aforesaid, in form aforesaid made, and not regarding the said several promissory notes, or any or either of them, or the said several sums of money, or any part thereof, so due and owing to the said, the said plaintiff, the said defendants, or any or either of them, have not paid or any part thereof, although the same to pay, they, the said defendants, have been often thereto requested, to wit, at the county aforesaid, but the same to pay have hitherto wholly neglected and refused, and still do refuse, to the damage of the said plaintiff dollars; therefore, he brings suit, etc.¹²⁴

(Mississippi)

For that heretofore, to wit, on the day of, 19.., the said was indebted to said plaintiff in the sum of dollars and for the payment of which the said, defendant in this suit did execute his two promissory notes, one for the sum of dollars due and payable on, and the other for the sum of dollars due and payable, each of said notes bearing interest at the rate of per cent per annum from maturity; true copies of said notes being filed herewith and made a part of this declaration and marked exhibits "A" and "B."

That both of said notes are now past due and that defendant has been often requested to pay the same as he has therein promised and agreed to do, but that he has not complied with his said promise and agreement by paying same, and that he has wholly made default therein, and that he has thus far failed and refused to pay the amount due on said notes, or any part thereof, to the damage of plaintiff in the sum of dollars, together with interest at the rate of per cent per annum from the maturity of said notes. Wherefore, plaintiff brings this suit and demands judgment against defendant in the sum of dollars, principal and dollars interest, and such other interest on said notes as may accrue during the pendency of suit, and all costs of suit.

(West Virginia)

For this, to wit, that heretofore, to wit, on the day of, 19.., at the county aforesaid, the defendant made, executed and delivered to plaintiff his certain promissory note in writing,—a copy of which is filed herewith marked exhibit "A" and made a part of plaintiff's declaration,—the date whereof is the same day and year aforesaid, whereby he promised and agreed, for value received, as acknowledged and set out on the face of said note, to pay to plaintiff, or its order,

¹²⁴ Godfrey v. Buckmaster, 1 Scam. 447.

in days after date (which period had elapsed before the commencement of this action), at the office of
, in, the sum of dollars
 and cents (\$.), with interest after maturity
 until paid, with the further provision that if said note should
 be paid by the day of of the year
 aforesaid, there should be allowed thereon a discount of
 per cent. And plaintiff avers that afterwards, to wit, on the
 day of, 19.., when, according to
 the tenor and effect thereof and according to the custom and
 usage of merchants, the said note became due and payable, the
 same was presented for payment, but that the same was not
 paid to plaintiff or any one for it; and that although said note
 has long since been due and payable, defendant had not paid
 the amount of same, or caused the amount of same to be paid
 for plaintiff or any one for it.

By means whereof, and by reason of the non-payment of the
 said sum of dollars and cents
 (\$.), last above mentioned, an action has accrued to plain-
 tiff to have and demand of and from defendant, the said last
 mentioned sum of dollars and cents
 (\$.), with interest thereon from the day of
, 19.., until payment.¹²⁵

Yet, etc.

Affidavit

(Venue)

....., being first duly sworn, says, that he is the
 treasurer and general manager of the, a corpora-
 tion created and organized under the laws of the state of
, the plaintiff named in the foregoing action; and that
 there is, as he verily believes, due and unpaid from the defend-
 ant in said action to the said plaintiff upon the demand stated
 in the declaration in said case, including principal and interest
 to this date, after deducting all payments, credits and setoffs
 made by the defendant, and to which he is in any wise entitled,
 the sum of dollars and cents (\$.)

.....
 Taken, sworn to and subscribed before me, a notary public
 in and for county,, this
 day of, 19...

.....,
 NOTARY PUBLIC.

1077 Purchase money; sale of land, action, proof

Assumpsit will lie for the recovery of the unpaid purchase
 price under a verbal contract for the sale of land which has been

¹²⁵ Acme Food Co. v. Older, 64
 W. Va. 255 (1908).

fully performed on the part of the vendor by the delivery of a deed for the premises, and nothing remains to be done but to pay the money.¹²⁶ To prove performance, or an offer to perform on his part, in an action for the purchase price, the vendor is not bound to affirmatively show a good title, but he may rely on his tender of a deed without producing evidence of title.¹²⁷

1078 Purchase money; sale of land, Narr. (Ill.)

For that whereas, heretofore, to wit, on the day of, 19.., at the county of, and state of aforesaid, said plaintiff.. made and entered into a certain contract and agreement to and with the said B, the defendant.. in this cause, in and by which said contract and agreement the said A, said plaintiff agreed to sell and did sell to the said B, the following described real estate, to wit: (Set out legal description) of the principal meridian, and containing (.....) acres more or less, situated in the county of, and the state of; and in and by the said contract and agreement the said A further agreed to and with the said defendant.., B, that ..he.., the said plaintiff.., would convey and warrant unto the said defendant.., B and ..h.. assigns, the premises above described by a good and sufficient warranty deed of the said premises on the demand of the said defendant.., B. Said plaintiff.. further agreed to and with the said defendant.., B, that ..he.., said plaintiff, would pay the general taxes assessed and levied upon the said premises for the year 19..; and that ..he.. would furnish to and for the said defendant.. a complete abstract of title of the above described premises, with a continuation thereof brought down to cover the date of the said contract and agreement, to wit, the day of, 19.., at ..h.., the said plaintiff..' expense. And the said defendant.., B, in and by the said contract and agreement so made and entered into by and between the said plaintiff.. and the said defendant.., agreed to and with the said plaintiff.. that ..he.., said defendant.., would and ..he.. thereby did purchase of the said plaintiff.. the real estate and premises above described, and ..he.. the said defendant.., therein covenanted and agreed to pay to the said A, for the said premises above described the sum of dollars upon the delivery to ..h.., the said B, or ..h.. assigns, goods and sufficient warranty deed conveying to the said B, or ..h.. assigns good title to the said premises above described, as ..he.., the said B should demand. And the said A agreed to and with

¹²⁶ Knight v. Collins, 227 Ill. 348, 353 (1907).

¹²⁷ Dwight v. Cutler, 3 Mich. 566, 577 (1855).

the said B that ..he.. would pay to the said A the said sum of dollars for the said premises in the following manner, that is to say: dollars in cash in hand paid at the signing of the said agreement, and the sum of dollars in cash on or before the day of, 19.., together with interest thereon at the rate of per centum per annum from the date of the said contract, to wit, the day of, 19..; and the said B further agreed to and with the said plaintiff.. that ..he.. would make a subdivision of the premises above described, which were the same premises so sold by the said plaintiff.. to the said defendant.., and to pay all expenses for platting the same and for recording the said plat, when so made, in the recorder's office of county in the state of aforesaid; and the said defendant.. further agreed to and with the said plaintiff.. that ..he.., the said defendant.. would hold and conduct an auction sale for the choice of lots in the said subdivision when the same was so made as aforesaid of the said above described premises, and that ..he.. said defendant.. would pay to the said plaintiff.. all money derived from such sale of and for the choice of lots, the said money so paid to be credited upon and applied by the said A as part of the purchase money for the said premises above described, each lot in the said subdivision as made to be entitled to a credit of the part of such total sum so derived from the sale of lots therein; and it was further agreed that for the balance of purchase money of and for the said above described premises, to wit, the sum of dollars not paid in cash by the said B as aforesaid, the said defendant.., would give to the said plaintiff.. notes, the payment of which would be secured by trust deeds or mortgages upon the said lots in the said subdivision when so made as aforesaid of the premises above described, given, made and executed by the purchasers of the lots therein; the said notes so agreed to be given by the said defendant.. to the said plaintiff.. were to be proportioned upon the said lots in the said subdivision aforesaid in equal amounts according to the number of the lots therein, and the notes on each lot were to be made in and of two equal amounts and to be and become due and payable on or before two years after the date of the said contract, to wit, the day of, 19.., said notes to bear interest thereon, at the rate of per centum per annum after the date thereof, payable annually; and the said defendant.. further agreed to and with the said plaintiff.. that ..he.., the said defendant.., would make and acknowledge or pay for the making and acknowledgment of all papers, deeds, trust deeds and mortgages which were or would be necessary to convey the said property above described by the said A, to the said defendant.. or ..h.. assigns as ..he.., said defendant.., should direct and to secure the deferred payments thereon, and

the said defendant.. would pay all recording fees for the filing of record any and all trust deeds or mortgages that the said plaintiff.. might be given, by the said defendant.. as part payment of the purchase money for the premises above described.

And the said A, the plaintiff.. herein, being so bound and obligated as aforesaid did thereupon furnish to the said B, a complete abstract of title brought down to cover the date of the said agreement as is therein provided, which said abstract of title the said B then and there accepted, and upon an examination thereof by the said defendant.., the said defendant.. then and there approved of the title to the said premises and requested the said plaintiff.. herein to convey by good and sufficient warranty deed or deeds the said premises above described to ..h.. the said defendant.. and ..h.. assigns as ..he.. the said defendant.. then and there directed ..h.., said plaintiff.., to convey the same; whereupon, he, the said A and his wife joining him, made, executed and delivered to the said defendant.., B and ..h.. assigns, good and sufficient warranty deeds to the said above described premises as ..he.., the said B demanded, in and by which said warranty deeds ..he.., the said A, conveyed to the said B and ..h.. assigns, good title to the said above described premises, and ..he.. the said A, then and there paid the said general taxes levied and assessed upon the said premises for the said year 19.., and ..he.. the said plaintiff.. then and there did and performed all of the terms and conditions of the said contract and agreement by ..h.., the said plaintiff.., to be done and performed. Yet, well knowing that the said plaintiff.. had done and performed all of the conditions and terms of the said contract and agreement to be done and performed by ..h.., and well knowing that ..he.., the said plaintiff.. had furnished to ..h.., the said defendant.., a complete abstract of title to the said premises above described, with a continuation thereof brought down to cover the date of the said agreement, to wit, the day of 19.., and that the said plaintiff.. at the request and demand of the said defendant.. conveyed by good and sufficient warranty deeds good title to the said premises above described to the said B or ..h.. assigns, all of which said deeds of conveyance so made and executed by th.. plaintiff.. were accepted and approved of by the said defendant.., and although often requested so to do, said defendant.. ha.. not done and performed the terms and conditions of the said agreement to be by ..h.. done and performed, and although often requested so to do, ha.. not paid to the said plaintiff.. the said sum of dollars in manner and form as ..h.., the said defendant.. agreed in and by the said contract to pay the same, or any part thereof, nor the interest thereon or any part thereof; nor ha.. the said defendant.. paid to the said plaintiff.. the said sum of dollars due and payable on or before the day of, 19.., or any part

thereof, or the interest thereon at the rate of per centum per annum as agreed in and by the terms and the conditions of the said contract or any part thereof; and the said defendant.., although often requested ha.. not paid to the said plaintiff.. the said sum of money derived from the sale of lots in the said subdivision or any part thereof, or the interest thereon, or any part thereof; and the said defendant.., although often requested so to do, ha.. not given to the said plaintiff.. any note or notes, the payment of which was or were secured by trust deeds or mortgages upon the said lot or lots in the said subdivision so made by the said defendant.., to secure the payment of the balance of the said purchase of and for the above described premises not paid in cash or money by the said defendant.. to the said plaintiff..; and the said defendant.., although often requested so to do, ha.. not paid to the said plaintiff.. any part of the recording fees and expenses by ..h.. incurred in and about the said sale and transfer and conveyance of the said real estate and premises above described and agreed to be paid by the said defendant.. but so to do ha.. totally neglected and refused to do, to the damage of the said plaintiff.. in the sum of dollars, and therefore ..he.. bring.. ..h.. suit, etc.

1079 Reimbursement; accommodation maker, Narr. (Md.)

For that on day of, 19.., the defendant requested the plaintiffs to sign his promissory note for the sum of dollars as accommodation co-makers and that they acceded to his request and executed with him and others a promissory note of the following tenor and effect: (Set out note); and afterward said note upon the decease of the said was by the administrator of the said, the payee of the said note, duly assigned to, now, who afterwards, to wit, on day of, 19.., demanded payment of said note upon which was due the principal thereof and interest thereon from; but the defendant did not pay the same or any part thereof, and the plaintiffs were compelled to and did pay said sum of, to the said, who thereupon duly assigned to them said promissory note on the day of, 19.., before the bringing of this suit. And the defendant has not paid said sum of money or any part thereof.

1080 Reimbursement; surety, Narr. (Md.)

For that the defendant on day of, 19.., by his promissory note, in which the plaintiffs united and signed as surety of said defendant, now overdue, promised to pay to the order of, year after date

..... dollars with interest from date thereof, which note for value was duly assigned to the order of, but that said note and interest thereon was not paid by the said defendant, or any part thereof (except the interest thereon to) and that said note was paid by plaintiffs to the said and the said note was endorsed and assigned by said to said plaintiffs, before the bringing of this suit. And the defendant has not paid said sum of money or any part thereof.

1081 Rent; assignee of lease, action

An assignee of a lease is liable for a breach of an express covenant in the lease which runs with the land or the term, such as to pay rent, during the continuance of the privity of the estate between the lessor and the assignee of the term. An assignee of an unexpired term is not liable for rent of the entire unexpired term, unless expressly made so by contract. The mere taking of an assignment of the lease "subject to agreements," etc., in the lease assigned does not create a personal liability upon the assignee for rents accruing after a second assignment of the lease by the first leasee.¹²⁸

1082 Rescission of contract, action

If a party rescinds a contract, he cannot sue for a breach of it,¹²⁹ but he may sue in assumpsit to recover the consideration paid under the contract and interest, if the contract has been rescinded by mutual consent;¹³⁰ or he may sue to recover for work performed under the rescinded contract.¹³¹ A rescission of a contract cannot be based upon the opposite party's partial neglect or refusal to comply with the terms of the contract, but the failure must be entire and defeating the object of the contract, or rendering it unattainable. For a partial dereliction and non-compliance in matters not necessarily of first importance to the accomplishment of the object of a contract, the injured party must seek his remedy upon the stipulations of the contract itself.¹³² Proceeding with the performance of the con-

¹²⁸ Consolidated Coal Co. v. Peers, 166 Ill. 361, 368 (1897).

¹²⁹ Hubbardston Lumber Co. v. Bates, 31 Mich. 158, 169 (1875).

¹³⁰ Smith v. Treat, 234 Ill. 552, 557 (1908).

¹³¹ Selby v. Hutchinson, 4 Gilm. 319, 328 (1847).

¹³² Selby v. Hutchinson, 4 Gilm. 333.

tract after default made by the opposite party is a waiver of the default and an affirmance of the continued subsistence of the contract.¹³³

1083 Rescission of contract; performance, proof

A readiness and willingness on the part of the vendor to perform are sufficiently shown by notice to the vendee of such readiness and willingness and the advertisement of the goods for re-sale. It is not necessary that shipment to the place of delivery shall be continued after notice of rescission from the vendee and his refusal to receive any more of the goods.¹³⁴

1084 Rescission of contract; re-sale, measure of damages

Upon the vendee's rescission of an executory contract, whether the articles contracted for are at the time manufactured or are thereafter to be produced, and a re-sale of the articles, the measure of damages is the difference between the contract price and the net amount realized from the re-sale; the right of re-sale is not limited to the place of delivery of the articles, but it is to be exercised, in good faith and with reasonable diligence, with a view of realizing the largest amount obtainable at the re-sale.¹³⁵

1085 Rescission of contract; declaration, requisites

In an action of assumpsit to recover for work performed under a rescinded contract, it is permissible to set up the contract by way of inducement, provided the rescission of the contract is plainly alleged.¹³⁶

1086 Royalties, Narr. (Ill.)

For that whereas, heretofore, to wit, on the day of, in the year, at the county aforesaid, the plaintiff.. by certain agreement in writing, a copy of which is filed herewith and made a part hereof marked exhibit "A," then and there leased to the defendant.. certain machines to be used in the process of manufacturing , to wit, certain machines known as ; certain other machines known as ; a certain other machine known as, all of which said machines were then and there the property of the plaintiff...

¹³³ Selby v. Hutchinson, *supra*.

¹³⁴ White Walnut Coal Co. v. Crescent Coal & Mining Co., 254 Ill. 368, 377 (1912).

¹³⁵ White Walnut Coal Co. v.

Crescent Coal & Mining Co., 254 Ill. 372.

¹³⁶ Selby v. Hutchinson, 4 Gilm. 328.

And the plaintiff.. by ..h.. said written agreement did then and there license the defendant.. and ..h.. operatives in employed at factory in the city of , to use said machines upon certain terms and conditions in said agreement in writing fully set forth, and the defendant.. upon ..h.. part, in consideration of such leasing by the plaintiff.., then and thereby agreed, amongst other things, that ..h.., the defendant.., would keep an account of all made by ..h.. or by any other person for ..h.. or for others, by the aid of the machines so leased, or any of them, or by the use of the patents by which said machines were then and there protected, or any of them; that ..h.. would render an account thereof to the plaintiff.., successors or assigns, on or before the day of each month, and in and by said account to specify the number of pairs of made under said lease and license during the calendar month next preceding, and the class to which said belonged in accordance with the schedule of rents and royalties in the said agreement in writing fully and at large set forth; that ..h.. would require the operator or operators on said machines to keep a daily account of all made on said machines upon certain printed forms to be furnished by the plaintiff.. in duplicate, one copy of which, containing such reports for the calendar month next preceding, to be sent to the plaintiff.. on or before the day of each month; and that said defendant.. agreed to pay to the plaintiff.. as rent for the machines so as aforesaid leased, and as royalty for the use of the patents by which the said machines were so protected, the rent or royalty specified in a certain schedule in said agreement at large set forth, on each pair of of the respective kinds mentioned and described in said schedule, made by the aid of said machines, or any of them, or by the use of said patents, or any of them; the rents and royalties for all of such made as aforesaid during any one calendar month to be due and payable on the day of the calendar month next following and to be paid within one month from that time.

And the plaintiff.. further aver.. that there was a provision incorporated into, and made a part of said contract, in and whereby it was agreed by the plaintiff.. that if the rents and royalties due as aforesaid on the day of any month should be paid on or before the day of that month,, the plaintiff.. would, in consideration thereof, grant a discount of per cent from the rents and royalties specified in the schedule aforesaid.

And the plaintiff.. aver.. that the defendant.. during the month of, in the year, did manufacture, by the aid of the machines aforesaid, so as aforesaid leased by the plaintiff.. to the defendant.., a large number of,

to wit,, thereof, and did in due course render to the plaintiff., an account specifying the number of so made under said lease and license during the calendar month aforesaid, to wit, the month of, in the year, and of the class to which said belonged according to the schedule aforesaid, in and by which said accounting so rendered it appeared that of the number of so as aforesaid manufactured during said month by the aid of said machines so leased as aforesaid, there were (Describe goods manufactured) for which, according to the terms of the schedule aforesaid ..h.. w.... to pay to the plaintiff.. the sum of per

And the plaintiff.. aver.. that by the terms of the lease and agreement aforesaid the defendant.. then and thereby became liable to pay to the plaintiff.. as royalty for the use of the machines aforesaid for the said month of in the year aforesaid the sum of dollars and which sum was payable by the defendant.. on the day of, in the year aforesaid, with the privilege, as aforesaid, to the defendant ..of paying the same on or before the day of, in the year aforesaid, and thereby becoming entitled to said discount of per cent upon the amount of said indebtedness.

And the plaintiff.. aver.. that afterward, to wit, on the day and year last aforesaid, the defendant., in consideration of ..h.. liability aforesaid then and there promised and faithfully undertook to pay to the plaintiff.. the said sum of when ..h.. should be afterward thereunto requested, but the defendant.. did not on or before the said day of, in the year aforesaid, pay the said sum of money, or any part thereof to the plaintiff.., but neglected and refused so to do for a long space of time thereafter, to wit, until the day of, in the year, at and upon which said last mentioned date the defendant.. paid to the plaintiff.. the sum of, and no more and from thence hitherto the defendant.. ha.. at all times wholly neglected and refused and still neglect.. and refuse.. to pay the balance of said sum of money or any part thereof, although often requested so to do; whereby an action hath accrued to the plaintiff.. to recover the same.¹³⁷ (Add consolidated common counts)

1087 Sale; acceptance of goods, liability

In the absence of a warranty, the purchaser is liable for the purchase price of goods which he does not return within a rea-

¹³⁷ A general demurrer was sustained to the declaration solely on the ground that the plaintiff had no cause of action under the particular interpretation of the license con-

tract which was made a part of the declaration as an exhibit. *Goodyear Shoe Machinery Co. v. Selz, Schwab & Co.*, 157 Ill. 186 (1895).

sonable time after discovery of a departure from the terms of the contract, or if he accepts the goods on delivery.¹³⁸ The exercise of acts of ownership over an article of purchase constitutes an acceptance of the article.¹³⁹

1088 Sale; partners interest, Narr. (Mich.)

For that whereas, the said plaintiff and the said defendant and one, of the city of, were for many years prior to, 19.., co-partners under the firm name and style of, conducting the business of jobbing and selling at retail, notions, underwear, hosiery and other like articles. And whereas for several years previous to the said day of, 19.., the said plaintiff had received a compensation for his services to the said business and as profits, large sums of money, annually, to wit, in the neighborhood of per year. And whereas, disagreements arose between the said on the one hand and the said plaintiff and said on the other. Thereupon, the said plaintiff and the said for a valuable consideration therein set forth, entered into a written contract upon the day of, 19.., with the said whereby and wherein the said agreed to purchase and said and plaintiff agreed to sell, the interests of the said and said plaintiff in said business, upon certain terms and conditions in said contract contained, a true copy of which contract hereinbefore referred to, is hereto annexed and marked exhibit "A," and made a part of this declaration.

And plaintiff avers that he in all things complied with the duties and obligations resting upon him under the terms of the said contract and agreement; and in all things executed the obligations imposed upon him by said contract insofar as said defendant would permit him to do so; and it thereupon became and was the duty of the defendant under said contract and agreement hereinbefore referred to, to pay to the said plaintiff the sums of money due to the said plaintiff under said contract upon the day of 19.., to wit, the sum of \$.....

And thereupon the said defendant afterwards, and to wit, on the day of, 19.., in consideration of the premises respectively then and there promised the plaintiff to pay to him, the said plaintiff, the said several sums of money so due to the said plaintiff, on request; yet, etc.

¹³⁸ American Theatre Co. v. Siegel, Cooper & Co., 221 Ill. 145, 147 (1906).

¹³⁹ Wolf Co. v. Monarch Refrigerating Co., 252 Ill. 491, 502 (1911).

1089 Sale; purchase price, Narr. (District of Columbia)

That heretofore on divers days before, and, the plaintiffs, sold and delivered to the said, at the latter's instance and request, goods, wares and merchandise to the value of dollars. That the said goods, wares and merchandise are more particularly described in the annexed particulars of demand, to which reference is hereby made. That said promised to pay to the plaintiffs for said goods, wares, and merchandise, the said sum of dollars. And that the said did not nor did anyone for him pay the said sum or any part thereof, and the said defendant as executor of the estate declined to pay said sum or any part thereof, and no one for him has paid any part thereof. Wherefore, etc.

(Illinois)

For that whereas on, to wit, the day of, 19.., in, to wit, in the county aforesaid, in consideration that the plaintiff would make for the defendant at his request a large quantity, to wit, pictures, at the price, to wit,, and would deliver to him the said pictures at a certain date thereafter, to wit, on or before, he, the defendant, promised the plaintiff to accept of it the said pictures when the same would be so made and delivered, and to pay the plaintiff the said price for the same, as follows, to wit, promissory notes of each for the sum of, payable on, each endorsed by the defendant by the name of, one of which notes was to be given at the time of making of said contract and the other on the delivery of the pictures as aforesaid; and the plaintiff avers that it did afterwards on, to wit, the day of, then and there make said pictures for the defendant, and then and there was ready and willing and offered to deliver the same to the defendant, and did deliver the same to the defendant and requested him to accept and pay for the same as aforesaid; yet, the defendant did not, nor would then or at any other time, pay the plaintiff therefor the price aforesaid, or any part thereof, or deliver to the plaintiff the said notes of the, endorsed by the defendant as aforesaid, but refuses so to do. To the damage, etc.

1090 Sale; refusal to accept cattle, Narr. (Ill.)

For that whereas, on, to wit, the day of, 19.., the defendant bargained for and bought of the plaintiff and the plaintiff then and there sold to the defendant at his request all of the plaintiff's steers, from three years old and

up then on the plaintiff's range, between the and the, estimated at about head, more or less, branded and marked on the right side, and on both sides; also all of the steers from three years old and up, to be delivered to the under their contract with the plaintiff known as the brand; also all of the steers four years old and upwards, to be delivered by the under their contract with the plaintiff, known as the brand, said steers to be good, merchantable cattle, with no stags, cripples, or big jaws among them; also all of the plaintiff's dry cows, then on the plaintiff's said range, and all dry cows to be delivered to the plaintiff under contract between the plaintiff and the, and the, all of said cows to be from two years old and up, branded and marked in manner as the said steers; the total number of dry cows estimated at about head, more or less; said steers and cows to be delivered by the plaintiff, to the defendant between, and on the cars at, in the state of, on the tracks, the defendant agreeing to pay for said steers dollars per head and for said cows dollars per head.

And the plaintiff further avers that in pursuance and in accordance with said contracts and at the place aforesaid, he was ready and willing and tendered and offered to deliver to the defendant and steers, and and dry cows; which and steers all were on the day of, either on the plaintiff's range between the and the, and marked on the right side, and on both sides, or were delivered after said last mentioned date to the plaintiff by the under their contract above referred to with the plaintiff, and marked the brand, said steers all being three years old and upwards; or were delivered after said last mentioned date to the plaintiff by the under their contract with the plaintiff above referred to, said steers being marked brand and being years old and upwards; and all of the steers above described being good, merchantable cattle, with no stags, cripples or big jaws among them; and the said and dry cows all were on said, 19.., on the plaintiff's range above described, or were after said date delivered to the plaintiff under the contracts between the plaintiff and the and the, referred to in said contract., all of said cows being two years old and upwards and branded and marked in the manner as said steers. But the defendant, contrary to his said contract, refused to accept all of the said and steers and and dry cows, and refused and declined to receive and accept thereof

and of said steers and and of said dry cows, and to pay therefor as aforesaid.

Whereby the plaintiff has been deprived of divers great gains and profits which otherwise would have accrued to him from the delivery of said cattle as aforesaid, and was obliged to and did re-sell a large portion of said cattle at a great loss, and suffered great loss by reason of the depreciation in the market price of cattle not received by defendant as aforesaid, and was put to great expense and loss in keeping, feeding and caring for said cattle, to the loss of plaintiff of, to wit, dollars. (Add common counts)

1091 Sale; refusal to deliver goods, Narr. (Ill.)

For that whereas, heretofore, to wit, on the day of, 19.., at the city of, county of, and state of, the said plaintiff, at the special instance and request of the said defendant.., bargained with the said defendant.., and the said defendant.. then and there sold to the said plaintiff a large quantity of goods, to wit (Describe goods), to be delivered by the said defendant.. to the said plaintiff in certain specified quantities, as follows, to wit (State deliveries), at the city of, county of, and state of, and to be paid for in cash, days after delivery thereof, or at a discount of per cent allowed, if paid in cash days after the date of said delivery, by the said plaintiff to the said defendant.. at the rate as aforesaid; and in consideration thereof, and that the said plaintiff, at the like special instance and request of the said defendant.. then and there had undertaken and faithfully promised the said defendant.. to accept and receive the said goods and to pay them for the same at the rate or price aforesaid, they, the said defendant.., undertook and then and there faithfully promised the said plaintiff to deliver the said goods to the said plaintiff as aforesaid; and although the said time for the delivery of said goods as aforesaid has long since elapsed, and the said plaintiff hath always been ready and willing to accept and receive the said goods and to pay for the same, at the rate or price aforesaid, to wit, at the city of, aforesaid, whereof the said defendant.. ha.. always had notice; yet, the said defendant.., not regarding ..h.. said promises and undertakings, but contriving and intending to deceive and defraud the said plaintiff in this behalf, did not, nor would, within the time aforesaid, or at any time afterwards, deliver the said goods, or any part thereof for the said plaintiff at the city of, aforesaid, or elsewhere, but wholly neglected and refused so to do, save as follows, to wit, (Describe goods).

And the said plaintiff further avers that after the making of the said bargain and contract with said defendant.. as

aforesaid, to wit, on, etc., and on divers other days and times between that day and the commencement of this suit, it, the said plaintiff, confiding in said promise and undertaking of the said defendant., expecting . . h . . performance thereof, to wit, at the city of, and county of, and state of, aforesaid, did make and enter into divers bargains and agreements with divers persons for the sale to them respectively, of divers quantities of such goods, so bargained for, and purchased by the said plaintiff, as aforesaid, and for the want of said goods which the said defendant.. ought to have delivered to said plaintiff, as aforesaid, it, the said plaintiff, was forced and obliged to deliver to them, the said persons respectively, divers quantities of certain other goods which said plaintiff was obliged to purchase in open market and at a much higher price or rate than that bargained for by said plaintiff with said defendant., to wit, at the price of \$. more than the price or value of said goods, which said defendant.. ought to have delivered to the said plaintiff as aforesaid; and thereby the said plaintiff has sustained great loss, to wit, a loss amounting to the sum of (\$) dollars, to wit, at the city of, county of, and state of Illinois, aforesaid. (Add common counts)

1092 Sale; refusal to deliver leaf lard, Narr. (Ill.)

For that whereas, on the day of,, at the city of, to wit, at the county aforesaid, the plaintiff., at the request of the defendant., bargained with the defendant.. to buy of, and the defendant.. then and there agreed to sell to the plaintiff.. a large quantity, to wit, (.) pounds of leaf lard, at the price of (.) cents for each pound thereof.

Delivery of said lard by the defendant.. to the plaintiff.. to commence, and to be consummated, and to be made as follows: that is, pounds daily, when the hogs cut by defendant.. should enable to deliver that quantity; but if on any day or number of days during said period from to, the product of defendant.. should fall short of pounds, then defendant.. should have the privilege of delivering enough on days when product should be in excess of pounds, to make the average of defendant.. daily delivery pounds.

Said delivery to be at, to wit, at the county aforesaid, and said lard to be paid for by the plaintiff.. to the defendant., daily on the delivery thereof as aforesaid.

And in consideration thereof, and that the plaintiff.. had promised the defendant.. at request to accept and receive the said lard, and to pay defendant.. for the same at

the price aforesaid daily on delivery,, the defendant., on the day first aforesaid, at the county aforesaid, promised the plaintiff.. to deliver the said lard to ..h.. as aforesaid, and plaintiff.. aver.. that defendant.. w.. able to deliver, daily, during the period mentioned from to pounds of leaf lard. And although said time for the delivery of said lard has long since elapsed, and the plaintiff.. w., during the period aforesaid, from to, always ready and willing to accept and receive the said lard, and to pay for the same at the price aforesaid, to wit, at the county aforesaid; yet the defendant.. did not, nor would, within the time aforesaid or afterwards deliver the said lard, or any part thereof to the plaintiff.. at the county aforesaid, or elsewhere, but refused so to do. Whereby, the plaintiff.. ha.. been deprived of divers great gains and profits which otherwise would have accrued to ..h.. from the delivery of said lard to ..h.., as aforesaid, and thereby the said plaintiff.. h.. sustained great loss, to wit, a loss amounting to the sum of (\$.....) dollars, to wit, at the city of, county of, and state aforesaid.

1093 School district discontinued, action

The legal discontinuance of a school district puts an end to an executory contract with it for the purpose of performance and entitles the other party to bring an action for the profits that would have been realized had the contract been completed.¹⁴⁰

1094 Shipment; delay, Narr. (Miss.)

That at divers times between the day of, 19.., and the day of, 19.., the said defendants then and now being partners engaged in business of common carriers of freight, the plaintiffs had delivered to said defendants, at their station within this state, carload lots of lumber, to be transported and delivered to plaintiffs at their station within said state, and that the said defendants promised to plaintiffs to so transport and deliver the said carload lots of lumber within a reasonable time after the delivery thereof to them in each case, in consideration of their usual, customary and legal tariff charges which the plaintiffs on their part promised to pay at the date of said delivery to the defendants, the initials and car numbers, the point from which shipped, the date of re-delivery to the plaintiffs, the reasonable time required for transportation,

¹⁴⁰ Chalstran v. Board of Education, 244 Ill. 470, 476 (1910).

the number of days in transit and the number of days reasonably detained, with reference to each of said cars, being specifically shown and set forth by exhibit "A" to plaintiff's declaration, which is made a part hereof; but that the defendants, notwithstanding their promise aforesaid, and notwithstanding that the plaintiffs paid their tariff charges, as promised by them that they would do, have wholly failed to re-deliver each of said carload lots of lumber to plaintiffs at their station within a reasonable time, and for the length of time by said exhibit each shown to have been unreasonably detained; that each of said cars was so unreasonably detained and delayed by the negligence of the defendants switching the same to sidetracks and there leaving it between the point of origination and the point of destination; and that the said defendants promised the plaintiffs, as required by rule of the Demurrage and Delayage Rules of the Mississippi Railroad Commission, adopted on and effective that they would pay to them dollars per ear per day on each of said cars so detained; but that though often requested so to do, the said defendants had hitherto wholly failed and refused to pay to the plaintiffs the said sums so promised to them, to their damage in the sum of dollars. Wherefore, etc.¹⁴¹

1095 Shipment; non-delivery, action

An action of assumpsit will lie against a railroad company to recover the value of goods which it has failed to deliver.¹⁴² In an action of assumpsit against a common carrier for the value of lost merchandise, the measure of damages is the market value of the merchandise at the place of its delivery.¹⁴³

1096 Shipment; non-delivery, Narr. (Ill.)

For that whereas, before and at the time of the making of promises hereinafter next mentioned, the defendant was a common carrier of goods and chattels for hire, over and by a certain railroad, and being such carrier aforesaid, on or about the day of, 19.., at, in the state of I., at the request of the defendant, the plaintiffs caused to be delivered to said defendant certain goods and chattels of the plaintiffs, to wit, pounds of bulk potatoes safely and securely loaded in a certain railroad freight car then and there furnished to the plaintiffs by the defendant, said potatoes being then and there of the value of dol-

¹⁴¹ *Keystone Lumber Yard v. Yazoo & Mississippi Valley R. Co.*, 53 So. 8 (Miss. 1910).

¹⁴² *Chicago & Northwestern Ry. Co. v. Ames*, 40 Ill. 249 (1866).

¹⁴³ *Plaff v. Pacific Express Co.*, 251 Ill. 243, 248 (1911).

lars, to be taken care of and safely carried by the defendant as such carrier as aforesaid, in and by and over said railroad, from said, in the state of I, aforesaid, to, in the state of P, and at the last mentioned place to be safely delivered by said defendant for the plaintiffs to, then and there agents of the plaintiffs at the streets in said; and in consideration thereof, and of certain reward to the defendant in that behalf, it, the defendant, on the day aforesaid, in the county aforesaid, promised the plaintiffs to take care of said goods and chattels and safely to carry the same in and by the said railroad to, aforesaid, and at the last named place to safely deliver the same for the plaintiffs.

And although the defendant as such carrier as aforesaid, then received the said goods and chattels, at the place aforesaid for purpose aforesaid, it has not taken care of the said goods and chattels nor safely carried the same from, in the state of I, to, in the state of P, aforesaid, nor has it at the last mentioned place safely delivered the same for the plaintiffs at the streets, to, then and there agents of plaintiffs; but, on the contrary thereof, the defendant so carelessly behaved itself with respect to the said goods and chattels that by and through the mere negligence and improper conduct of the defendant and its servants in this behalf, the said goods and chattels afterwards, to wit, at, on the day aforesaid, became and were wholly lost to plaintiffs.

2. And for that whereas, also, on the day aforesaid, at, in the state of I, in consideration that the plaintiffs had then and there caused to be delivered to the defendant at its request, divers goods and chattels of the plaintiffs, to wit, pounds of bulk potatoes safely and securely loaded and stored in a certain railroad freight car then and there furnished to the plaintiffs by the defendant, said potatoes being then and there of the value of dollars, to be taken care of and safely carried by the defendant from, in the state of I, to, in the state of P, aforesaid, and at the last mentioned place to be by it delivered for the plaintiffs, for reward to the defendant in that behalf, it, the defendant, promised the plaintiffs to take care of the last mentioned goods and chattels and safely to carry the same from, aforesaid to aforesaid, and at the last named place to deliver the same for the plaintiffs to, at the streets, in said in a reasonable time then next following.

And although the defendant then received the last named goods and chattels at the place aforesaid, and although a reasonable time for the carriage and delivery thereof as aforesaid has long since elapsed, the defendant did not nor would within such

reasonable time or afterwards, though often requested, safely carry the last mentioned goods and chattels from, aforesaid, to, aforesaid, or at the last named place deliver the same for the plaintiffs to, then and there agents of the plaintiffs, at the streets, in said, but has hitherto wholly neglected so to do; whereby the last named goods and chattels by reason of the careless and negligent behavior of the defendant in this behalf and through the negligence and carelessness, and default of the said defendant in the premises, the said goods and chattels were so negligently and carelessly and unreasonably delayed by the defendant, that (being of a perishable nature) they became and were by reason of said negligent and unreasonable delay, decayed and spoiled, and afterwards, to wit, on the day and year aforesaid, at, aforesaid, became and were and are wholly lost to the plaintiffs.

3. And whereas, also, heretofore, to wit, on the day of, 19.., to wit, at, in consideration that the said defendant, at its special instance and request, then had the care and custody of divers goods and chattels of the said plaintiffs, to wit, goods and chattels of like number, quantity, quality, description and value as those in said first and second counts mentioned, it, the said defendant, undertook and then and there faithfully promised the said plaintiffs to take due and proper care thereof, whilst the said defendant so had the care and custody of the same; yet, the said defendant, not regarding its said promise and undertaking, but contriving, intending to injure and defraud the said plaintiffs in this behalf, whilst the said defendant so had the care and custody of the said goods and chattels, took so little and such bad and improper care thereof that the same afterwards, to wit, on the day and year aforesaid, at, aforesaid, became and were greatly damaged and injured and wholly lost to the said plaintiffs. Wherefore, etc.

b

For that whereas, the said defendant before and at the time of the making of its promise and undertaking hereinafter next mentioned was a common carrier of goods and chattels for hire from a certain place, to wit, from, in the county and state aforesaid, to a certain other place, to wit, to, in the state of, to wit, at the county aforesaid: and the said defendant being such carrier as aforesaid, the said plaintiff, heretofore, to wit, on the day of,, at, to wit,, in the county aforesaid, at the special instance and request of the said defendant, caused to be delivered to the said defendant, so being such carrier as aforesaid, at, to wit, in the county of, aforesaid, certain goods and chattels, to wit, one carload of merchandise of the said plaintiff, of great value, to wit, of one

..... dollars, to be taken care of and safely and securely carried and conveyed by the said defendant as such carrier as aforesaid from aforesaid to aforesaid, and there, to wit, at aforesaid to be safely and securely delivered by the said defendant to the said plaintiff or to his order; and in consideration thereof and of certain reward to the said defendant in that behalf the said defendant, being such carrier as aforesaid, there and then, to wit, on the day and year aforesaid, at, to wit, in the county aforesaid, undertook and faithfully promised the said plaintiff to take care of the said goods and chattels and safely and securely to carry and convey the same from aforesaid, to aforesaid and there, to wit, at aforesaid safely and securely to deliver the same to the said plaintiff or to his order. And although the said defendant as such carrier as aforesaid then and there had received the said goods and chattels for the purpose aforesaid, it did not regard its said duty as such carrier nor its said promise and undertaking so made as aforesaid, and contriving and fraudulently intending, craftily and subtly to deceive and injure the said plaintiff in this behalf, has not taken care of the said goods and chattels or safely or securely carried or conveyed the same from aforesaid to aforesaid, nor has there, to wit, at aforesaid safely or securely delivered the same to the said plaintiff or to his order; but, on the contrary thereof, it, the said defendant being such carrier as aforesaid, so carelessly and negligently behaved and conducted itself and with respect to the said goods and chattels aforesaid, that by and through the mere carelessness, negligence and improper conduct of the said defendant, and its servants in this behalf, the said goods and chattels, being of the value aforesaid, afterwards, to wit, on the day and year aforesaid, at,, to wit, in the county of aforesaid, became and were wholly lost to the said plaintiff, to wit, in the county of aforesaid, to the damage, etc.

1097 Special assessment, action

A city may maintain assumpsit for the collection of a special assessment after it has become due.¹⁴⁴

1098 Subscription to shares of capital stock ordered paid by decree, Narr. (Ill.)

For that whereas, the plaintiff is a corporation, and was organized in the year, under and by virtue of a law of the state of Illinois, providing for the establishment of telegraphs,

¹⁴⁴ (3220), C. L. 1897 (Mich.).

which was enacted and went into effect in the year, and having a capital stock of dollars, divided into shares of the par value of dollars each, the subscriptions and payments for which stock by its subscribers and stockholders constituted, and constitute, the means and fund for the prosecution of the plaintiff's business and the payment of its debts.

And the plaintiff, being such corporation as aforesaid, the said defendants as such copartners as aforesaid and under the said name and style of heretofore, to wit, on the day of, 19.., at the county aforesaid, made and entered into an agreement in writing with the plaintiff, in and by which agreement the said defendants subscribed for, and agreed to and with the plaintiff to take shares of the capital stock of the plaintiff, and to pay for the same in the manner following, that is to say, per centum of the par value thereof at the time of making said agreement, and the balance of the said par value thereof, to wit, of dollars, upon each of said shares so subscribed for and agreed to be taken by said defendants as aforesaid, from time to time, as the directors of the plaintiff should order. And the plaintiff further avers, that it was in and by said agreement provided that no one of the several orders, so to be made in pursuance thereof as aforesaid should direct or call for the payment of any sum of money in excess of the sum of upon each and every of the said shares so subscribed and agreed to be taken as aforesaid.

And the defendants thereby, for a valuable consideration, undertook and promised to pay to the plaintiff, for each and every share so subscribed for by the defendants, as aforesaid, the sum of dollars (except per centum of the said amount, which was payable, by the terms of said agreement, at the time of the making of the same), in such instalments and at such times as said defendants might be lawfully called upon and required to pay the same, and according to the legal tenor and effect of the said agreement.

And the plaintiff further avers that the said defendants have heretofore paid to the said plaintiff the sum of dollars and cents, upon each and every of the said shares so subscribed for and agreed to be taken by them as aforesaid, or a total sum of dollars upon all of said shares, but that the said defendants have never heretofore paid to the plaintiff any other or further sum than as aforesaid upon the said shares or either of them, so that there was on and previous to the day of, 19.., a balance unpaid upon said shares of dollars and upon each and every of said shares, and which was then liable to be called for and ordered and required to be paid under and by virtue of the terms of said agreement.

And plaintiff further avers that a large number of other per-

sons than said defendants subscribed for and agreed to take other shares of said capital stock, and to the extent and amount, including those subscribed for and agreed to be taken by the defendants, as aforesaid, of all the shares into which said capital stock was divided; that the several agreements, by which said other persons agreed to take said other shares, were similar in all respects to the said agreement of the defendants, except as to the name of the subscriber, his residence, date of his subscription, and number of such shares agreed to be taken; that each and all of the said subscriptions and agreements were entered into and made, to wit, in the years; that the several persons, including said defendants who so subscribed for and agreed to take the shares of said capital stock, as aforesaid, thereby became stockholders of the plaintiff, and subscribers to its capital stock; that they number more than different persons, and are widely scattered, and reside in more than different states and territories of the United States of America, and in other countries; that the names and residences of many of them are unknown to the plaintiff.

That a certain suit was begun on or about the day of, 19.., in the court of county, in the state of Illinois, on the chancery side thereof, wherein one and certain other persons, stockholders of the plaintiff, were complainants (and which suit was so commenced on behalf of said and said other persons, and all others similarly situated), and also wherein the plaintiff and others were defendants, and in which suit the plaintiff was duly summoned, and appeared and submitted to the jurisdiction of the said court; and which suit has been ever since its commencement, and now is, pending and undetermined in said court; that certain proceedings were afterwards therein had; that the said court did therein, on, to wit, the day of, 19.., take jurisdiction and control of the plaintiff and its powers, property and affairs, and did appoint a receiver for the plaintiff, and conferred upon him all the powers and duties usually granted and imposed upon receivers in such cases; and which order of appointment has never been heretofore revoked, vacated, annulled nor set aside; and the plaintiff avers that its business, powers, and duties, and the powers and duties of the board of directors of the plaintiff have been thereby vested in, and exercised, managed and controlled, by the said court and said receiver, at all times heretofore and from the time of said appointment, of all of which the said defendants had notice; that the said is the receiver of the plaintiff appointed as aforesaid, and has been such for many years continuously last past, and as such receiver is in possession of and entitled to receive the property and effects of the plaintiff.

Plaintiff further avers, that previous to the day of, 19.., it had become and was justly indebted

to various and sundry persons in a large amount, to wit, in the sum of dollars, and which indebtedness has never been paid; that the whole of said indebtedness accrued against said plaintiff subsequent to the making and entering into the said contract of subscription and agreement to take and pay for the said shares, by the said defendants; that on the said last mentioned date, and for a long period previous thereto, the plaintiff had no property, real or personal, with which to pay the said indebtedness or any part thereof, except the amounts unpaid upon the shares of its capital stock, subscribed for and agreed to be taken by the defendants and by its other stockholders and subscribers to its capital stock as aforesaid; that previous to said last mentioned date, a small number of said stockholders had paid to the plaintiff dollars upon each of the shares of said capital stock subscribed for by them respectively, and the par value and in full for the same; that the balance and remainder, and the others of said stockholders and subscribers, have not now, and had not previous to said last mentioned date, nor have any of them paid more than the sum of dollars upon each and every of the shares of said capital stock severally subscribed for, or held by them; that many of them have never paid more than the sum of cents upon each and every of such shares severally subscribed for by them; that there was on said last mentioned date, a balance and amount unpaid upon each and every of the shares of said capital stock (excepting those which have been paid for in full as aforesaid), including the said shares subscribed for by defendants as aforesaid, of not less than dollars, and which the said stockholders, including the defendants, were on said last mentioned date liable to be severally called upon and ordered to pay according to the terms of the said agreements of subscription; that it therefore became and was necessary that the said stockholders and each of them (except those who had paid in full) and including the said defendants, should severally be ordered to contribute and pay a certain portion *pro rata*, of the par value of the shares of said capital stock subscribed for by them, to be used and applied in payment of the said indebtedness, and the expenses of said receiver, incurred in and about the affairs of the plaintiff.

And plaintiff further avers, that all of said stockholders of plaintiff were not made parties to said suit and proceeding in said court of county, and that it was impracticable to make them such parties; and plaintiff further avers, that certain other proceedings were therein in said suit had; that the said court, having then and there full and competent jurisdiction, power and authority in the premises, did, on said day of, 19.., make and render therein a certain decree, and did in and by said decree, find and declare, order and decree, as follows, to wit: That the plaintiff is a corporation and was duly organized in the year,

under and by virtue of a law of the state of Illinois, providing for the establishment of telegraphs, which was enacted and went into effect in the year; that the said suit was commenced in the year, against the plaintiff and certain other persons, who were each duly served with process, and appeared in said suit in person and by counsel, and that said suit has ever since been and is now pending and undetermined in said court; that a receiver was appointed in said suit of and for the plaintiff and its property, both real and personal, on the day of, upon supplemental bill of complaint filed in said suit, and on account of mismanagement and malfeasance of the then officers of the plaintiff and as alleged and set forth in said supplemental bill, and as well by consent and stipulation of the plaintiff and the other parties to said suit; that said receivership has never since been discontinued; that the plaintiff is largely indebted and to the extent of more than dollars, and which indebtedness is in the form of judgments and decrees rendered against the plaintiff; that about two-thirds of said indebtedness accrued against the plaintiff, and was created previous to the day of, and on account of the construction of its telegraph lines and other property, and material furnished and labor performed and money advanced in and about such construction, and in and about the operation of the lines of plaintiff; that a large portion of this two-thirds of said indebtedness was and is for money loaned and advanced to the plaintiff, and which was used by it in the construction and operation of its telegraph lines and other property; that said court had, before said day of, by reference had for that purpose in said suit, determined and found the entire indebtedness of the plaintiff, and the name of each creditor of the plaintiff, and the amount due each, and that the same then appeared by the records in said suit; that each and all of said creditors did, under the orders of said court in said suit, make proofs before said court of their several claims, judgments and decrees against the plaintiff, and did thereby make themselves parties to said suit; that all the property of the plaintiff had before said last mentioned date been sold and disposed of, under the orders of said court in said suit, subsequent to the said appointment of the receiver as aforesaid, and the proceeds therefrom distributed to the creditors of the plaintiff; that on said last mentioned date the plaintiff had no property, real or personal, except as thereafter stated in said decree, with which the said indebtedness or any part thereof could be paid; that the only means or resources that the plaintiff had on said last mentioned date for the payment of said indebtedness were and are the balances and amounts remaining unpaid and due from its stockholders upon their several subscriptions to its capital stock, and the amounts unpaid upon the capital stock of the plaintiff; that there are about stockholders of the plaintiff, who are widely scattered through more

than different states and territories of the United States, and in other places, and the larger portion of whom live at great distances from the place of holding said court, and from said county of, while the residences of many of them are entirely unknown to said receiver or his solicitor, although diligent inquiry had been made by them in reference thereto, and that it was therefore impracticable that all of the said stockholders should be made parties to said suit and proceeding; that the said subscriptions to the shares of said capital stock were made principally in the years; that many of the stockholders of the plaintiff have become insolvent or have died since their subscriptions were made; that a few of said stockholders have paid the full par value of the shares of said stock subscribed for or held by them, namely, the sum of dollars on each and every share thereof; that some of the said stockholders have paid per cent of such par value, or dollars on each share subscribed for or held by them; that many of said stockholders have paid only cents upon each share subscribed for by them; that all of said stockholders excepting those who have paid dollars on each of the shares of said stock subscribed for or held by them respectively, now owe and are liable to the plaintiff for an unpaid balance upon their several subscriptions to such stock of not less than dollars on each share, or per centum of the par value thereof; and that many of them owe thereon much more than per centum of the par value thereof; that the liability of the stockholders to said company is based upon and controlled by contracts of subscriptions made with said company and in and by which contracts the said stockholders agree to take the number of shares subscribed for by them, and pay for the same in instalments, as follows: per centum of the par value thereof at the time of the making of their respective subscription therefor, and the balance of said par value as the directors of the plaintiff from time to time should order; that the said stockholders who have not paid in full, as aforesaid, are severally liable to the plaintiff for the balances now unpaid upon the shares of such stock subscribed for or held by them, being the difference between the amounts actually paid thereon, and the par value thereof; that the said unpaid balances still remain liable to be called for, and ordered, and required to be paid by the said subscribers, stockholders, and their assigns; that the collection of whatever sums are required to be paid by said stockholders, in order to pay the said indebtedness, is likely to be attended with great difficulty, labor and expense; that it was, therefore, necessary and proper that per centum of the par value of each share of the capital stock subscribed for and agreed to be taken or held by said stockholders, and not paid for in full, should be called for and required to be paid by them and their assigns, for the purpose of paying

said indebtedness; and which said findings and declarations by said court in said decree, plaintiff avers, were and are true.

Plaintiff further avers that the said court did, for the purpose of paying the said indebtedness of the plaintiff, also, in and by said decree order, adjudge and decree as follows, to wit: that a call or assessment be made upon the stock and stockholders of the plaintiff (excepting those who have paid in full), their legal representatives and assigns, of per centum of the par value of the shares of said stock subscribed for or held by them, being dollars and cents on each and every share thereof, and that the stockholders of the plaintiff, and each and every one of them (excepting those who have paid dollars on each and every share subscribed for or held by them), and their legal representatives and assigns pay to the receiver of the plaintiff, the said, the several amounts so called for and assessed and required and ordered to be paid, namely, dollars and cents on each and every share subscribed for or held by them respectively; and that the same be paid upon the demand of said receiver or his agent, and that the said receiver should at once proceed to collect the sums so ordered paid by said decree, and make all necessary demands for such payments, employ such assistance and counsel, take such action and institute such suits and proceedings in the name of the plaintiff, and in such jurisdictions as the said receiver should be advised or deem expedient or proper, and for the purpose of enforcing the payment of the said sums ordered paid as aforesaid; which said decree was fully entered of record in said suit on said day of; of all of which the said defendants had notice. And plaintiff also avers that said defendants as such copartners as aforesaid and under the said name and style and on and before the said last mentioned date, became and were parties to said chancery cause and are bound by said decree so made and entered as aforesaid.

And the plaintiff avers that thereupon, and from the time of the making and entering of the said decree as aforesaid, and thereby, the said defendants as such co-partners became indebted to the plaintiff, and were liable to pay to the plaintiff the sum of dollars and cents upon each and every of the said shares so subscribed for by them as aforesaid, to wit, the sum of dollars and cents, upon and according to the demand of said as receiver of the plaintiff.

And the plaintiff further avers that the said, as such receiver, and in pursuance of the terms of said decree, did, on, to wit, the day of, 19.., at, to wit, the county aforesaid, make demand upon the said defendants as such copartners as aforesaid and under the said firm name and style that they pay to him as the receiver of the plaintiff the said sum of money last above mentioned, within

..... days from the said last mentioned day, at the office of him, the said, at room, number street, in the city of, in said county, and also did at the same time give notice to the said defendants of the making and entering of said decree.

And the plaintiff avers, that although often requested, the defendants or either of them have not paid the said sum of money, or any part thereof, but to pay the same have neglected and refused, and still refuse, to the damage of the plaintiff in the sum of dollars.

1099 Taxes, Narr. (District of Columbia)

For that the said plaintiff, by its proper officers and agents, duly valued the gross earnings of the said defendant in the sum of dollars for the fiscal year ending, and assessed thereon as a tax against the said defendant the sum of dollars as the tax for the year ending, as provided by the Act of July 1, 1902, and the amendment thereto of April 28, 1904, on which said tax there has accrued penalties of dollars for failure to pay the said tax when and as the same became payable; that the said sum of dollars became due and was payable before the first day of June,, but the same was not paid or any part thereof, nor have the said penalties or any part thereof been paid, although requests have repeatedly been made for both of the said tax and the penalties thereon. Wherefore, etc.

Affidavit

District of Columbia, ss.:

....., being duly sworn says that he is the collector of taxes for the District of Columbia; that by reason of his official position as such tax collector he knows that the defendant herein,, was duly taxed in the year, the sum of dollars for the fiscal year ending, the same being per cent of its gross earnings for the preceding fiscal year ending, assessed at dollars; that the said tax was not paid before the first of June,, and that the penalties for such nonpayment accrued thereon amounting to dollars; that said tax is carried on the personal tax ledger of the District of Columbia in the name of said defendant; that neither said tax nor penalties nor any part of either has been paid; that said tax and penalties, amounting to dollars, are now justly due and owing to the said District of Columbia from the said defendant,, exclusive of all set offs and just grounds of defense.

.....,

Collector of taxes.

Subscribed, etc.

(Maryland)

For that heretofore, to wit, on and after the day of, 19.., there was in the ownership and possession, or custody, of said defendant, in the city of, state of, barrels of distilled spirits, upon which there was duly made by the State Tax Commissioner of Maryland, an assessment of \$..... per barrel, amounting in the aggregate to \$....., for purposes of state and city taxation, for the year 19.., upon which said assessment as aforesaid there was lawfully levied by the mayor and city council of, by ordinance No., approved, 19.., a tax of \$..... per \$100 for city purposes, for the year 19.., said tax upon said total assessment, including interest and penalties to the date of the institution of this suit, amounting to \$....., which said amount is now due and payable by said defendant to the plaintiff, and the defendant, though often requested so to do, has failed and refused to pay said tax, or any part thereof, and still fails and refuses so to do.

I hereby authorize the institution of the above suit.

.....

Mayor.

1100 Taxes paid under protest, action

A drain tax paid under protest cannot be recovered back under section 4359, Comp. Laws, on the ground that there was no proper release of the right of way in the proceedings to acquire it.¹⁴⁵

1101 Taxes paid under protest, Narr. (Miss.)

In the northern suburbs of of is situated a college, or institution known as college. The land upon which the same is situated is a part of (Describe property), according to the official map of, and is described in the deed from to, which deed is of record in the office of the chancery clerk at, On said lands are certain buildings and improvements, erected exclusively for the purpose of conducting a college, and not adapted for any other purpose. In the main building are class rooms, recitation rooms, a dining hall, a chapel, a dormitory for pupils who board at the institution, and rooms

¹⁴⁵ Ranney Refrig. Co. v. Smith,
157 Mich. 302, 305 (1909). See
Section 1056.

for the teachers. There is also a president's home or residence, in which there is a reception room, an office, and bed rooms for the president and his family. The institution is designed and has been conducted throughout all the years of its existence as a college, or a boarding school for young ladies. Throughout such existence, said institution has had a president, a regular corps of instructors, constituting the faculty, plaintiff being now the president. It has a high curriculum and grants diplomas in the arts and sciences and various branches of learning taught therein.

Said college was established and successfully conducted for a number of years by, who died some years ago. After his death the college was conducted by his family and representatives until the year, when negotiations were had with plaintiff, a professional educator, who then resided at, looking to a sale of the property to him, and a continuation of such college under his direction. These negotiations resulted in the purchase of the property by plaintiff, who later removed his family to and took charge of and continued to conduct said institution of learning. Since he has had charge of the same he has improved the property and its equipment with a competent faculty, and has continued to conduct said institution for the education of youth up to the present time. The property, since plaintiff has acquired control thereof, has been used solely and exclusively for the purpose of such institution for the education of youth, and for no other purpose, and it is now being so used. Said property consists of the grounds and buildings thereon and the personal effects situated in the buildings constituting a part of the equipment of said college, all being used directly and exclusively for the education of youth and for no other purpose.

Under the opinion of the attorney general of this state, said property has been held to be exempt from taxation and has not been assessed for state and county taxes. But at the end of, plaintiff learned, to his great surprise, that the said property had been assessed for taxation by the authorities of said Plaintiff at once protested against the legality of this assessment, claiming that under section 4251 of the Code of 1906, the said property, being used directly and exclusively for the education of youth, was exempt and could not be taxed by said municipality. But the officers of said municipality, by, insisted on the payment of such taxes and informed plaintiff that unless the taxes so assessed were paid, said property would be subjected to sale therefor. Thereupon, on the day of, plaintiff paid to the city tax collector of said of, the taxes on said property demanded by the officials of said municipality, namely: the sum of dollars, and received from said tax collector the tax receipt for

the amount. A copy of said tax receipt with the endorsements thereon is filed as exhibit "A" to this declaration.

Plaintiff shows that at and before the time of the payment of such taxes, he earnestly protested against the payment of the same, urging that under the facts hereinbefore stated that the property was exempt and not liable to taxation. But that the said tax collector persisted in his unlawful purpose and stated that he would subject the property to sale if the taxes were not paid. Being thus coerced, to avoid the evident purpose of said tax collector to subject said property to sale, plaintiff paid the said sum of money to the said tax collector under protest, and the fact that the same was paid under protest was, by said tax collector endorsed on the said receipt. Plaintiff assumes and therefore charges that the amount so collected as a city tax claimed to be due on said property has been paid into the city treasury by said collector, except, however, a certain part thereof, retained by him as commissions. Plaintiff avers that said amount was wrongfully and unlawfully collected and was paid under protest as above set forth. He shows that the property was exempt from taxation and that the said tax collector was without authority to collect the same, and that the payment thereof into the said treasury was wrongful and unlawful. Plaintiff therefore, asks judgment against the defendant for the said sum of dollars, with interest and costs.

1102 Taxes paid under void sale, action

A tax-buyer, under the Illinois statute may, in an action of assumpsit recover back from the owner the amount of his bid and any taxes he has paid upon the land purchased to protect the purchase, where land is sold, which is not subject to taxation, where the taxes have been paid prior to the sale, or where the taxes for which the sale was made arose from double taxation, where the real estate was so imperfectly described as to render the sale void so that the purchaser obtained nothing by virtue of his purchase.¹⁴⁶

1103 Telegraph service, Narr. (Miss.)

That the plaintiff,, is a corporation doing business in the city, district, county and state aforesaid and is engaged in the transmitting and receipt of messages to and from various parts of the United States; that theretofore, to wit, from day of, 19.., to the day of, 19.., inclusive, at the special instance and

¹⁴⁶ Joliet Stove Works v. Kiep, 230 Ill. 550, 557 (1907).

request of the defendant, plaintiff transmitted messages to various parts of the United States, and received messages directed to the defendant, the tolls and charges of which amount in aggregate to the sum of dollars, which said sum defendant promised to pay when requested so to do by plaintiff; and plaintiff avers that defendant has not paid plaintiff said sum of money, or any part thereof, although often requested to do so; whereby an action hath accrued to said plaintiff to have of said defendant the sum of dollars.

Affidavit

(Venue)

..... personally appeared before the undersigned, notary public of, manager of, who, after being by me duly sworn, states on oath that the above account against of dollars is just, due and unpaid.

Witness my hand and notarial seal this day of, 19..

1104 Tenants in common, action

A co-tenant may be sued in assumpsit for the value of a proportionate share in personal property held by him in common, by treating the retention of the property as a conversion by sale.¹⁴⁷

1105 Transportation; failure to provide, Narr. (Miss.)

That plaintiff operates and conducts throughout the United States an itinerary show; that it owns its private sleeper and private baggage car, carrying or more persons; that it applied to the railroad company, defendant herein, at, to be transported to the city of, on its itinerary, giving to, assistant general passenger agent,, a list of the engagements of said company, plaintiff herein, for the month of,; whereupon, the said, acting for said defendant and having full authority to do so, agreed on behalf of said defendant to convey the said cars of the plaintiff from to the various points in, at which places plaintiff desired to exhibit its shows in accordance with the schedule furnished to the said defendant's general passenger agent; that a copy of said agreement is hereto attached and marked exhibit "A," and it is asked to be considered as if set out in full in words and figures; that after the execution of said agreement,

¹⁴⁷ Fiquet v. Allison, 12 Mich. 328, 332 (1864); Williams v. Rogers, 110 Mich. 418, 423 (1896).

the defendant inspected the plaintiff's cars, and pronounced the same perfectly satisfactory to its operating department, and moved the plaintiff with comparative safety in accordance with its agreement with plaintiff, reaching on the day of, 19..

That after its performance at, the plaintiff desired to be transported to the town of, the point of its next engagement; that defendant's agents and servants, in violation of the express contract entered into with the plaintiff, negligently and willfully refused to transport the plaintiff and willfully and negligently refused to carry out said contract of transportation with the plaintiff, although the plaintiff offered to do and tendered performance of everything required of it under said contract, at all times being ready and willing to pay the compensation provided under said contract, until the day of, 19.., when the said defendant moved the plaintiff company to, en route to, moving the plaintiff's private sleeper car, but willfully and negligently refusing to move the plaintiff's baggage car.

Plaintiff alleges and avers that it lost all of its engagements from until its engagement at, on the day of, 19..; that said delay and loss was sustained and occasioned solely and only by the utter disregard exhibited by the defendant for the rights of the plaintiff under said contract; that there was an utter and willful failure upon the part of defendant's agents and servants to comply with said contract; that said refusal to move said car and to comply with said contract was either the result of willfulness or utter disregard of consequences.

The plaintiff alleges and avers that by reason of the failure on the part of the said defendant company,, said plaintiff sustained actual damages in the sum of dollars; that the defendant refuses to pay said sum or any part thereof, although often demanded, wherefore, etc.

1106 Trespass on land, action

An action of assumpsit which arises from the waiver of a trespass or injury to land rests upon the fiction of an implied indebtedness to pay the damages which have accrued by the commission of the wrong.¹⁴⁸

1107 Trespass on land, declaration, requisites

In an action of assumpsit, under Michigan statute, for a tres-

¹⁴⁸ Bradley-Watkins Co. v. Kalamazoo Circuit Judge, 144 Mich. 142,

146 (1906); (11207), (11208), C. L. 1897 (Mich.)

pass on lands, the declaration must show the damages to have accrued out of the trespass.¹⁴⁹

1108 Use and occupation, generally

An action for use and occupation is maintainable at common law for land occupied by a party, when the relation of landlord and tenant can be established by the permission and assent of the owner to the occupation, by an express or implied promise to pay a certain sum in satisfaction of such use, or by a demise.¹⁵⁰ This action is also maintainable against a vendee for his occupation of premises after notice of the vendor's abandonment of the contract for its purchase, and for the occupation of premises during the existence of a contract for its purchase, if, the vendee has abandoned the contract without the vendor's fault.¹⁵¹

By special statutory provision, which was passed to remedy certain hardships resulting from a previous statute, an action of debt or assumpsit for use and occupation is maintainable in Illinois against the vendee who has unjustly occupied premises under a contract of purchase which he refuses to perform.¹⁵²

No implication of a contract to pay for use and occupation arises if the land is held adversely to its owner and all the world.¹⁵³ This is so, notwithstanding the Michigan statute which authorizes the bringing of an action of assumpsit for trespass on timber land. The action thus authorized being intended to be one for damages sustained by the trespass and not for use and occupation.¹⁵⁴

Use and occupation, under Michigan practice, may be sued for generally or specially, without reference to the form of the lease.¹⁵⁵

An action for use and occupation is not confined to the recovery of rent for the period the premises were actually occupied, but may cover the rent due for the entire period until the rela-

¹⁴⁹ *Lockwood v. Thunder Bay River Boom Co.*, 42 Mich. 536, 540 (1880); (11207), C. L. 1897 (Mich.).

¹⁵⁰ *Ward v. Bull*, 1 Fla. 278; *Lockwood v. Thunder Bay River Boom Co.*, 42 Mich. 538.

¹⁵¹ *Dwight v. Cutler*, 3 Mich. 566, 575 (1855).

¹⁵² *Hadley v. Morrison*, 39 Ill. 392, 398 (1866).

¹⁵³ *Chicago Terminal Transfer R. Co. v. Winslow*, 216 Ill. 166, 171 (1905); *Lockwood v. Thunder Bay River Boom Co.*, 42 Mich. 539; *Ward v. Warner*, 8 Mich. 508, 520 (1860).

¹⁵⁴ *Lockwood v. Thunder Bay River Boom Co.*, 42 Mich. 540; (11207), C. L. 1897 (Mich.).

¹⁵⁵ *Conkling v. Tuttle*, 52 Mich. 630, 632 (1884).

tion of landlord and tenant has been legally terminated by notice.¹⁵⁶

1109 Use and occupation, life and sub-tenant, death of life tenant, proportionment of rent, action

At common law, the death of a life tenant terminated the sub-tenancy, and no rent could be recovered from the sub-tenant for the time he occupied the premises previous to the death of the life tenant, because the rent could not be apportioned. By Illinois statute, rent which is due at the death of a life tenant may be apportioned and recovered in an action against the sub-tenant.¹⁵⁷

1110 Use and occupation, Narr. (Ill.)

For that whereas, to wit, on the day of, 19.., at, to wit, the city of, in the county of aforesaid, the said defendant was indebted to the plaintiff in the sum of dollars for the use and occupation by defendant, at the special instance and request of defendant, of certain premises of the plaintiff, which said premises the defendant, by the sufferance and permission of the plaintiff, had for a long time prior thereto held, used, occupied, possessed and enjoyed, which said mentioned sum of money was to be paid to the plaintiff by the defendant on request; and being so indebted the said defendant, in consideration thereof, afterwards, to wit, on the day and year last aforesaid, at the city of, in the county aforesaid, undertook and then and there faithfully promised the said plaintiff to pay to the plaintiff the said last mentioned sum of money when the defendant should be thereunto afterwards requested. Yet, the defendant, although often requested so to do, has not paid to the plaintiff the said sum of money so due as aforesaid, or any part thereof, but so to pay has wholly refused and still does refuse, to the damage of the plaintiff.

b

For that whereas, at and during the time wherein the cause of action herein set forth accrued, the said defendants were partners, doing business under the name of "B," in the business of catching fish in Lake Michigan, and selling and disposing of the same in the state and county aforesaid. That upon the day of, the said defendants entered into a verbal agreement with plaintiff.. for the use and occupation of certain premises in the city of, state of, known as, to be used by the said

¹⁵⁶ *Huntington v. Parkhurst*, 57 453, 455 (1911); Par. 35, c. 80, Mich. 38, 46, 48 (1891). Hurd's Stat. 1911, p. 1458.

¹⁵⁷ *Wilson v. Hagey*, 251 Ill. 452,

defendant for storage and dock in the presecution of said fish business, for which said use and occupation the said defendants agreed to and with this plaintiff to pay ..h.. the sum of (\$.....) dollars per month, in advance, commencing on the day of and continuing from month to month. That said defendants' use and occupation aforesaid continued from the day of, until the day of That plaintiff agreed to allow defendants a credit of (\$.....) dollars, to be credited on the (\$.....) dollars due for the month of, in consideration of certain repairs to be made on the premises by defendants, but plaintiff.. allege.. that said repairs were never in fact made, and said agreement for credit is and was canceled, and there is still due plaintiff.., from defendants, (\$.....) dollars, for the month of aforesaid. That the money due for the months of,,, as aforesaid, became due and payable upon the of each said month, making a total sum due and payable from said defendants, to plaintiff.., for the aforesaid months, on the day of, of (\$.....) dollars; and being so indebted, the defendants, in consideration thereof, then and there promised the plaintiff.. to pay ..h.. the said sum of money on request. Yet, the defendants, though requested, have not paid the same or any part thereof to the plaintiff, but refuse so to do; to the damage of the plaintiff of (\$.....) dollars, and therefore ..he.. bring.. this suit.

1111 Wages, demand

To

You are hereby notified that the sum of dollars and cents is now due me from you for wages as; that I hereby demand of you payment of said sum; and that if default is made in its payment for three days, I shall commence suit for the recovery of said sum and the statutory attorney's fees.¹⁵⁸

Dated, etc. (Add affidavit of service)

1112 Water, failure to supply, Narr. (Miss.)

That the said defendants are indebted to the plaintiffs in the sum of dollars for supplying defendants' tank, near, with water, from the day of, 19.., to the day of, 19.., at their request; and being so indebted, the defendants, in consideration thereof afterwards, to wit, on the date and year last aforesaid, then and there undertook and faithfully promised

¹⁵⁸ Par. 13, c. 13, Hurd's Stat.
1909.

the plaintiffs to pay them said sum of money when they, the defendants, should be thereunto afterwards requested.

2. And that, on the day and year last aforesaid, in consideration of the plaintiffs, at the like special instance and request of the defendants, had before that time supplied defendants' tank, near, with water, from the day of, 19.., to the day of, 19.., they, the defendants, undertook and then and there faithfully promised the said plaintiffs to pay them so much money as they therefor reasonably deserve to have of the defendants when they, the defendants, should be thereunto afterwards requested; and plaintiffs aver that they therefor reasonably deserve to have of the defendants, the further sum of dollars, of which the defendants had notice. Yet, the defendants, although often requested, have not paid the plaintiffs the said several sums of money, or either of them, or any part thereof.

COMMON COUNTS

1113 Generally; common and special counts

Common assumpsit counts or *indebitatus* assumpsit will sustain a recovery upon an express contract which has been fully or substantially performed and nothing remains to be done but to pay the amount due under it.¹⁵⁹ The common counts are insufficient to permit proof of an excuse of the non-performance of a condition precedent; as a recovery upon a contract with condition precedent can only be had on a declaration which states the reason for a failure to comply with the condition.¹⁶⁰

In assumpsit, the common counts and a count upon a special contract, are distinct and different causes of action, where the basis of recovery is different under each.¹⁶¹

1114 Award

An award of arbitrators may be relied upon under the count of accounty stated, or under the common assumpsit counts.¹⁶²

¹⁵⁹ *Evans v. Howell*, 211 Ill. 85, 92 (1904); *Olcese v. Mobile Fruit & Trading Co.*, 211 Ill. 539, 545 (1904); *Bauer v. Hindley*, 222 Ill. 319, 322 (1906); *Peterson v. Pusey*, 237 Ill. 204, 207 (1908); *Rubens v. Hill*, 213 Ill. 523, 536 (1905); *Concord Apartment House Co. v. O'Brien*, 228 Ill. 360, 369 (1907); *Preston v. Smith*, 156 Ill. 359, 363 (1895).

¹⁶⁰ *Expanded Metal Fireproofing Co. v. Boyce*, 233 Ill. 284, 289 (1908), overruling *Foster v. McKeown*, 192, 339 (1901) as to scope of common counts.

¹⁶¹ *Richter v. Michigan Mutual Life Ins. Co.*, 66 Ill. App. 606, 608 (1896); *Gorman v. Newaygo Circuit Judge*, 27 Mich. 138 (1873).

¹⁶² *Macdonald v. Bond*, 195 Ill. 122 (1902).

1115 Building contract

The common counts are insufficient to sustain a recovery upon a building contract which requires the obtaining of an architect's certificate as a condition precedent to the right of payment. In an action upon a building contract the declaration must set out the contract, aver performance as to the furnishing of material and the performance of work, and state the reason for the failure to satisfy the condition by furnishing the architect's certificate.¹⁶³

1116 Fraud

A party who furnishes material and labor upon fraudulent representations that he is obliged to do so may, after the discovery of the fraud, recover the value of the material and labor under the common counts.¹⁶⁴

1117 Gaming

In an action of assumpsit to recover money lost at gaming, it is sufficient to count upon money had and received by the defendant to the plaintiff's use.¹⁶⁵ The common counts, without the conclusion, "contrary to the form of statute" (*contra formam statuti*) will support the recovery of money deposited for gaming purposes, if no objection, based upon the want of the allegation, is made to the declaration before judgment.¹⁶⁶

1118 Insurance policy

The common counts are insufficient to support a recovery upon a policy of insurance.¹⁶⁷

1119 Money had and received

Money had and received may be recovered under the common counts for money had and received.¹⁶⁸ Money obtained unjustly and inequitably retained by a person may be recovered from him under the common counts.¹⁶⁹ No contractual relation is necessary to support a count for money had and received, if

¹⁶³ Hart v. Carsley Mfg. Co., 221 Ill. 444, 446 (1906); Expanded Metal Fireproofing Co. v. Boyce, 233 Ill. 289, overruling Foster v. McKeown, 192 Ill. 339.

¹⁶⁴ Citizens' Gaslight & Heating Co. v. Granger & Co., 118 Ill. 266, 270 (1886).

¹⁶⁵ Zimmerman v. Wead, 18 Ill. 304 (1857).

¹⁶⁶ Parmalee v. Rogers, 26 Ill. 56 (1861).

¹⁶⁷ Heffron v. Rochester German Ins. Co., 220 Ill. 514, 517 (1906); Richter v. Michigan Mutual Life Ins. Co., 66 Ill. App. 607.

¹⁶⁸ Chemical National Bank v. City Bank, 156 Ill. 149, 154 (1895).

¹⁶⁹ Donovan v. Purtell, 216 Ill. 629, 642, 643 (1905).

it can be shown that the money sued for legally belongs to the plaintiff.¹⁷⁰

1120 Money paid out for the defendant

An action under this count is sustainable only where the money was paid upon a request, express or implied, for the defendant, under an express or implied contractual relation.¹⁷¹

1121 Money paid under protest

The common counts are sufficient to sustain an action against a municipality for the recovery of money paid to it under protest.¹⁷²

1122 Payment in articles

The common counts are sufficient to sustain a recovery on an agreement to pay a certain sum in specified articles of personal property, at an agreed price, on a particular day, or within a reasonable time, and there is a failure to deliver the articles; because in such case the non-delivery of the articles in accordance with agreement converts the transaction into a money obligation.¹⁷³

1123 Promissory note

A promissory note is admissible under the common counts although it is inadmissible on the ground of variance under a special count.¹⁷⁴ A joint promissory note is by Illinois statute joint and several and is admissible in evidence under common counts which declare jointly and severally.¹⁷⁵

1124 Special assessment

Under a Michigan statute a common count for money paid is sufficient to support an action by a city for the collection of a special assessment.¹⁷⁶

¹⁷⁰ *Highwat Commissioners v. Bloomington*, 253 Ill. 164, 177 (1912).

¹⁷¹ *Chicago v. Chicago & Northwestern Ry. Co.*, 186 Ill. 300, 303, 304 (1900).

¹⁷² *Chicago v. Northwestern Mutual Life Ins. Co.*, 218 Ill. 40 (1905).

¹⁷³ *McKinnie v. Lane*, 230 Ill. 544, 547 (1907).

¹⁷⁴ *Streeter v. Streeter*, 43 Ill. 155, 158 (1867).

¹⁷⁵ *Harrison v. Thackaberry*, 248 Ill. 512, 516 (1911).

¹⁷⁶ (3220), C. L. 1897 (Mich.).

FORMS

1125 District of Columbia

The plaintiff sues the defendant for money payable by the defendant to the plaintiff for goods sold and delivered by the plaintiff to the defendant.

And for work done and materials provided by the plaintiff for the defendant at his request.

And for money lent by the plaintiff to the defendant.

And for money paid by the plaintiff for the defendant at his request.

And for money received by the defendant for the use of the plaintiff.

And for money found to be due from the defendant to the plaintiff on account stated between them.

And the plaintiff claims the sum of dollars with interest from the day of, until paid, according to the particulars of demand hereto annexed.

Against administrator

For work done and materials provided by the plaintiff for the defendant's intestate during his life time at his request; and for money paid by the plaintiff for the defendant's intestate during his life time at his request; and for money found to be due from the defendant's intestate during his life time to the plaintiff on account stated between them.

1126 Florida

For that, on day of, 19.., the defendant was indebted to the plaintiff in the sum of dollars:

1. For money payable by the defendant to the plaintiff for goods bargained and sold by the plaintiff to the defendant.

2. For materials furnished by the plaintiff to the defendant at his request.

3. For money lent by the plaintiff to the defendant.

4. For money paid by the plaintiff for the defendant at his request.

5. For money received by the defendant for the use of the plaintiff.

6. For money found to be due from the defendant to the plaintiff on accounts stated between them.

7. For interest and divers sums of money due to the plaintiff by the defendant, foreborne to the defendant, at his request by the plaintiff before this time. Wherefore, etc.

1127 Illinois; goods sold and delivered, generally

For that whereas, heretofore, to wit, on the day of, 19., at, to wit, at the county aforesaid, the said defendant became and w.... indebted to the said plaintiff.. in the sum of dollars, in lawful money of the United States of America, for divers goods, wares, merchandise, and chattels, by the said plaintiff.. before that time sold and delivered to the said defendant.. at ..h.. special instance and request; and being so indebted, ..h.. the said defendant.., in consideration thereof, afterwards, to wit, on the day, year and place last aforesaid, undertook, and then and there faithfully promised the said plaintiff.. to pay ..h.. the said last mentioned sum of money, when the said defendant should be thereunto afterwards requested. (Yet, etc.)¹⁷⁷

1128 Illinois; goods sold and delivered, quantum valebant

And whereas also afterwards, to wit, on the day and year last aforesaid, at the place aforesaid, in consideration that the said plaintiff.. had before that time sold and delivered divers other goods, wares, merchandise, and chattels to the said defendant.., at ..h.. special instance and request, said defendant.. undertook, and then and there faithfully promised said plaintiff.. to pay ..h.. so much money as the last mentioned goods, wares, merchandise, and chattels, at the time of the said sale and delivery thereof were reasonably worth, when said defendant.. should be thereunto afterwards requested; and the plaintiff.. aver.., that the said last mentioned goods, wares, merchandise and chattels, at the time of the said sale and delivery thereof, were reasonably worth the further sum of dollars, of like lawful money, to wit, at the place aforesaid, whereof the said defendant.., afterwards, to wit, on the day and year last aforesaid, there had notice. Yet, etc.¹⁷⁸

1129 Illinois; work, labor and material

And whereas also afterwards, to wit, on the day, year and place last aforesaid, the said defendant.. became and w.... indebted to the said plaintiff.. in the further sum of dollars, of like lawful money of the United States for work and labor, care, and diligence of the said plaintiff.. by the said plaintiff.. before that time done, performed and bestowed, in and about the business of the said defendant.. and for the said defendant.. at h.. special instance and request, and also for divers materials and other necessary things by the said plaintiff.. before that time found and provided, and

¹⁷⁷ 2 Chitty's Pl., pp. 55, 37 (star
paging).

¹⁷⁸ 2 Chitty's Pl., p. 38.

used and applied, in and about that work and labor for the said defendant.., and at ..h.. like special instance and request; and being so indebted, the said defendant.., in consideration thereof, afterwards, to wit, on the day, year and place aforesaid, undertook and then and there faithfully promised to the said plaintiff.. to pay ..h.. the said sum of money in this count mentioned, when the said defendant.. should be thereunto afterwards requested. Yet, etc.¹⁷⁹

1130 Illinois; money counts

And whereas also afterwards, to wit, on the day, year and place last aforesaid, the said defendant.. became and w.... indebted to the said plaintiff.. in the further sum of dollars, of like lawful money of the United States:

For so much money by the said plaintiff.. before that time lent and advanced to the said defendant.., at ..h.. special instance and request.

And also for so much money by the said plaintiff.. before that time paid, laid out, and expended, to and for the use of the said defendant.., at ..h.. special instance and request.

And also for so much money by the said defendant.. before that time had and received to and for the use of the said plaintiff..

And also for so much money before that time due and payable from the said defendant.. to the said plaintiff.., for interest upon and for the forbearance of divers large sums of money before then due and owing from the said defendant to the said plaintiff.., and by the said plaintiff.. forborne to the said defendant.., for divers long spaces of time, before then elapsed, at the like special instance and request of the said defendant..

And being so indebted, the said defendant.., in consideration thereof, afterwards, to wit, on the day, year and place aforesaid, undertook and then and there faithfully promised the said plaintiff.. to pay ..h.. the said several sums of money in this count mentioned, when he the said defendant.. should be thereunto afterwards requested. Yet, etc.¹⁸⁰

1131 Illinois; account stated

And whereas also afterwards, to wit, on the day and year last aforesaid, at aforesaid, the said defendant.. accounted with the said plaintiff.. of and concerning divers other sums of money from the said defendant.., to the said plaintiff.. before that time due and owing, and then in arrear and unpaid, and upon such accounting the said defendant..

¹⁷⁹ 2 Chitty's Pl., p. 74.

¹⁸⁰ 2 Chitty's Pl., pp. 87, 88.

w.... then and there found to be in arrear and indebted to the said plaintiff.. in the further sum of dollars of like lawful money, and being so found in arrear and indebted, the said defendant.., in consideration thereof, afterwards, to wit, on the day and year last aforesaid, at aforesaid, undertook, and then and there faithfully promised the said plaintiff to pay ..h.. the said last mentioned sum of money, when the said defendant.. should be thereunto afterwards requested. Yet, etc.¹⁸¹

1132 Maryland

For money payable by the defendant.. to the plaintiff..

1. For goods bargained and sold by the plaintiff.. to the defendant...

2. And for work done and materials provided by the plaintiff for the defendant at ..h.. request.

3. And for money lent by the plaintiff.. to the defendant...

4. And for money paid by the plaintiff.. for the defendant.., at ..h.. request.

5. And for money received by the defendant.. for the use of the plaintiff...

6. And for money found to be due from the defendant.. to the plaintiff.., on accounts stated between them.

7. And for that the defendant.., on the day of, 19.. by ..h.. promissory note now overdue, promised to pay to the plaintiff.. \$...... after date, but did not pay the same.

And the plaintiff.. claim \$......

Against executor

For money payable by the defendant to the plaintiff

1. For goods bargained and sold by the plaintiff to the defendant's testator.

2. And for work done and materials provided by the plaintiff for the defendant's testator at his request.

3. And for money lent by the plaintiff to the defendant's testator.

4. And for money paid by the plaintiff for the defendant's testator, at his request.

5. And for money received by the defendant's testator for the use of the plaintiff.

6. And for money found to be due from the defendant's testator to the plaintiff, on accounts stated between them.

And the plaintiff claims \$......

¹⁸¹ 2 Chitty's Pl., p. 90. In practice, Sections 1127 to 1131 inclusive, are combined in one declaration; in which case, the common breach com-

mencing with "yet" or "nevertheless" is inserted only at the end of the declaration.

1133 Michigan

For that whereas, the said defendant.. heretofore, to wit, on the day of, 19.., at the of, in said county of, indebted to the plaintiff.. in the sum of dollars, for the price and value of goods then and there sold and delivered by the plaintiff.. to the defendant.., at request.

And in a like sum for the price and value of work then and there done, and materials for the same, provided by the plaintiff.. for the defendant.., at request.

And in a like sum for money then and there lent by the plaintiff.. to the defendant.., at request.

And in a like sum for money then and there paid by the plaintiff.. for the use of the defendant.. at request.

And in a like sum for money then and there received by the defendant.. for the use of the plaintiff..

And in a like sum for money then and there found to be due from the defendant.. to the plaintiff.. on an account stated between them.

And thereupon, the said defendant.. afterwards, and on the day and year aforesaid, in consideration of the premises respectively, then and there promised the plaintiff.. to pay the said several sums of money respectively, on request: Yet the said defendant.. (although often requested so to do) ha... disregarded said promises and ha... not paid any of the sums of money, or any part thereof, to the plaintiff.. damage of dollars, and therefore bring.. suit, etc.

1134 Virginia

For this, to wit, that heretofore, to wit, on the day of, 19.., the defendant.. w.... indebted to the plaintiff.. in the sum of \$...... for the price and value of goods then and there sold and delivered by the plaintiff.. to the defendant.. at request.

And in the sum of \$...... for the price and value of other goods bargained and sold by the plaintiff.. to the defendant.. at request.

And in the sum of \$...... for the price and value of work then and there done by the plaintiff.. for the defendant.. at request.

And in the sum of \$...... for materials furnished then and there by the plaintiff.. to the defendant.. at request.

And in the sum of \$...... for money then and there lent by the plaintiff.. to the defendant.. at request.

And in the sum of \$...... for money then and there paid by the plaintiff.. for the use of the defendant.. at request.

And in the sum of \$. for money then and there received by the defendant.. to the use of the plaintiff...

And in the sum of \$. for money found to be due from the defendant.. to the plaintiff.. on account then and there stated between them.

And the defendant.. afterwards, to wit, on the day and year aforesaid, in consideration of the premises respectively, then and there promised to pay the said several sums of money respectively to the plaintiff.. on request. Yet the defendant.. ha.. disregarded the said promises, and ha.. not paid any of the said several sums of money, or any or either of them, or any part thereof, but to pay the same ha.. hitherto wholly failed and refused, and still refuse.., to the plaintiff.. damage \$. . . . And therefore ..he.. bring.. ..h.. suit.

.....p. q.

AFFIDAVIT OF CLAIM

1135 District of Columbia

(Venue)

Before me, a notary public in and for the District of Columbia personally appeared, who being first duly sworn, deposes and says: that he is the plaintiff in the above entitled cause; that the said defendant.. owes and is justly indebted to said plaintiff in the full sum of dollars for groceries and cash furnished by him to said , at his special instance and request; that the said provisions and cash were furnished said for the purpose of enabling him to carry on a certain contract entered into between the said and the said in the construction of a certain portion of said; that the annexed account is just and true and is referred to and made a part of this affidavit; that the prices therein charged are reasonable and just and that agreed upon by the said; and that there is due to said plaintiff, the aforesaid amount of dollars exclusive of all set offs and just grounds of defense, with interest thereon from

Subscribed, etc.

1136 Illinois

(Venue)

....., being first duly sworn deposes and says that he is secretary of "A," a corporation organized and doing business under the laws of the state of, and as such is authorized to make this affidavit; that the demand of the plaintiff.. in the above entitled cause is for the amount due on a certain bond, a copy of which is fully set forth in the foregoing declaration, and that there is due to the plaintiff from

the defendants, after allowing all just credits, deductions, and set offs, (\$.....) dollars, with interest on that amount according to the terms of said bond, from the day of 19....

Subscribed, etc.

1137 Maryland

(Venue)

I hereby certify, that on this day of, 19.., before me, the subscriber, a of the said state, in and for the city aforesaid, personally appeared plaintiff.. and made oath in due form of law, (*who being conscientiously scrupulous of taking an oath*), *did solemnly, sincerely and truly declare and affirm, on the five books of Moses*, (he being an Israelite), that there is justly due and owing by the defendant.. in the said case, to the plaintiff.. on annexed (the cause of action in said cause), the sum of dollars and cents, (with interest from) over and above all discounts, to the best of his knowledge and belief.

And he further swears that he is the agent of the said plaintiff.. and duly authorized to make this affidavit, and has personal knowledge of the matters therein stated.

Witness, etc.

.....
(Official character)

1138 Michigan

In actions upon an open account or an account stated, the plaintiff may annex to his declaration or process whereby his action is commenced, a copy of the account and an affidavit made by himself or by anyone in his behalf, of the amount due, as near as can be estimated over and above all legal set offs. If the account is so annexed and the affidavit is made, a copy of each must then be served upon the defendant with the declaration or process.¹⁸² The treasurer of a mercantile corporation is presumed to have authority to make an affidavit of the amount due the corporation on an open account for the purpose of basing an action thereon.¹⁸³

1139 West Virginia

(Venue)

..... and having been duly sworn say that they are the plaintiffs mentioned in the foregoing declara-

¹⁸² (11191), C. L. 1897 (Mich.). v. Winter, 64 N. W. 1053 (Mich.

¹⁸³ Forbes Lithograph Mfg. Co., 1895).

tion and that there is, as they verily believe, due and unpaid from the defendants to the plaintiffs upon the demands stated in said declaration, including principal and interest after deducting all payments, credits and set offs made by the defendants, and to which they are entitled, the sum of dollars and cents at this date.

Taken and sworn, etc.

.....
Notary Public.

SPECIAL DEFENSES AND PLEAS

1140 Acceptance of bill of exchange; denial, pleadings

The denial of an acceptance of a bill of exchange must be by plea and oath, or by verified plea of non-assumpsit.¹⁸⁴

1141 Accord and satisfaction, plea (Ill.)

¹⁸⁵ That after the making of the several promises in the said declaration mentioned and before the commencement of this suit, on, to wit,, 19.. at, to wit, the county aforesaid, he, the defendant, paid to the plaintiff, and the plaintiff accepted from him, the defendant, divers moneys amounting to a large sum, to wit, the amount of all the sums of money in the said declaration mentioned, in full satisfaction and discharge of all the said several promises and all the sums of money last aforesaid, and this the defendant is ready to verify; wherefore he prays judgment, etc., when, etc.

Replication

¹⁸⁶ That defendant did not pay to the plaintiff the moneys in the said plea in that behalf mentioned, in full satisfaction and discharge of the several promises and sums of money in the said declaration mentioned, in manner and form as the defendant has above in that plea alleged.

1142 Agister's lien; plea requisites

A plea which claims an agister's lien under the Illinois statute should allege the substance of the contract by virtue of which the animals were placed in the agister's keeping to show the existence of a statutory lien, and the amount thereof.¹⁸⁷

¹⁸⁴ Peoria & Oquawka R. Co. v. Neill, 16 Ill. 269, 270 (1855); Sec. 52, c. 110, Hurd's Stat. 1909, p. 1701.

¹⁸⁵ Commence this and subsequent pleas as in Sections 885 to 889 inclusive.

¹⁸⁶ Commence and conclude as in Section 928.

¹⁸⁷ McNamara v. Godair, 161 Ill. 228, 233 (1896); Par. 3, c. 82, Hurd's Stat. (1909).

1143 Bona fide defense, failure to make; plea (Ill.)

That the said, sheriff, as aforesaid, did not interpose a *bona fide* defense to said suit of against him, the said sheriff, but colluded and conspired with the said and, to allow and permit the said to obtain said judgment set forth in said count against him, the said, sheriff as aforesaid, the said not having at the time a *bona fide* claim and demand against the said as against these defendants; and this the defendants are ready to verify, wherefore they pray judgment, etc.

Replication

That the said, sheriff, as aforesaid, did interpose a *bona fide* defense to said suit of against him, and that the said sheriff as aforesaid, did not collude and conspire with the said to allow and permit the said to obtain said judgment set forth in said count.

1144 Commission, real estate broker; bad faith

A real estate broker is not guilty of bad faith in affecting a sale by exhibiting to a purchaser the principal's property together with property belonging to others and listed with the broker for sale.¹⁸⁸

1145 Commission, real estate broker; license, want of, plea (Ill.)

That at the time of the making of the several supposed promises and undertakings in the said declaration mentioned, if any such were or was made, the said plaintiff was carrying on and exercising, within the corporate limits of the city of in said county, to wit, at the county of, the business of a real estate broker; and the said defendant in fact avers that at and prior to the time aforesaid there was and had been and from thence hitherto has been and still is in full force and effect, in said city of, in the county of aforesaid, an ordinance theretofore duly passed by the city council of said city of, duly approved by the mayor of said city and duly published according to law, in the words and figures as follows: (Set out ordinance *in haec verba*).

And the said defendant further avers that at the time of the making of the said several supposed promises and under-

¹⁸⁸ *Lemon v. Macklem*, 157 Mich. 475, 478 (1909).

takings in said declaration mentioned, the said plaintiff had not obtained and did not then, nor theretofore nor thereafter, have the license specified in said ordinance or any other license authorizing him to exercise such business so by him carried on, as real estate broker, within the city of, in said county of; but on the contrary thereof, the said plaintiff then was, theretofore had been and still is exercising the said business as real estate broker within the said city of, without having obtained any license therefor, and in violation of the provisions of said ordinance.

And the defendant further avers that the sum or sums of money sought to be recovered in this action by said plaintiff from this defendant is alleged to be due to said plaintiff from this defendant for commission or compensation, alleged to have been earned by said plaintiff as a real estate broker, in the sale of certain real estate for this defendant and at her alleged request, within the said city of, at the time aforesaid; and this the said defendant is ready to verify, wherefore she prays judgment if the said plaintiff ought to have the aforesaid, action against her, etc.

Replication

That at the time of the making of the promises by the defendant, as in plaintiff's said declaration mentioned, he, this plaintiff, was not, for commission or other compensation, engaged in the selling of or negotiating sales of real estate belonging to others, or obtaining or placing loans for others on real estate in the city of or elsewhere, in manner and form as the defendant has above in her plea alleged.

1146 Contract; mutuality, test

Unilateral contracts are void for want of mutuality. A contract is unilateral where the quantity and the quality of the subject matter of the contract are made to depend solely upon the demand and the satisfaction of one of the parties which might render the carrying out of the contract by the other impracticable or impossible.¹⁸⁹

1147 Contract, termination

A contract is terminable at the will of either party when it has no definite period of duration.¹⁹⁰

¹⁸⁹ Joliet Bottling Co. v. Citizens Brewing Co., 254 Ill. 215, 219 (1912).

¹⁹⁰ Joliet Bottling Co. v. Citizens Brewing Co., *supra*.

1148 Conversion by sheriff, plea (Ill.)

That the said, sheriff, did not pay to the defendants out of the proceeds of said sale averred in said count to be sufficient to satisfy the judgment of the defendants against the so recovered in said attachment suit, or any part thereof, but converted the same to his own use and benefit; and this the defendants are ready to verify, wherefore they pray judgment, etc.

Replication

That the said, sheriff, as aforesaid, did not convert the proceeds of said sale averred in said count to be the sum of, to his, the said own use and benefit.

1149 Delivery of goods by sheriff, without consent; plea (Ill.)

That part of the goods, chattels and property so seized and taken possession of by the sheriff as in said count mentioned were delivered, surrendered and released to with the consent of said and the remainder thereof sold and the proceeds of the same derived therefrom by the said, sheriff aforesaid, were paid over to in full settlement, satisfaction and discharge of all claim of the said against him, the said, sheriff, and no part of said proceeds was paid to the defendants to satisfy their said demand against; and this the defendants are ready to verify, wherefore they pray judgment, etc.

Replication

That no part of the goods, chattels and property seized and taken possession of by the said, sheriff as aforesaid, was delivered, surrendered or released to said with the consent of said and the remainder thereof sold and the proceeds derived therefrom by the said, sheriff as aforesaid, paid over to said in full satisfaction, release and discharge of all claims against him, the said, sheriff.

FIRE INSURANCE

1150 Additional insurance, substituted policy

The substitution of one policy for another of the same amount, although of a different company, does not constitute additional insurance when the original policy is canceled after the issuance of the substituted policy.¹⁹¹

¹⁹¹ Hartford Fire Ins. Co. v. Redding, 47 Fla. 228, 250 (1904).

1151 Arbitration agreed to after loss, pending; plea (Ill.)

And for further plea in this behalf the defendant says that the plaintiff ought not to have his aforesaid action against it, the defendant, because it says that among the provisions of the policy sued upon in this case, which provision was a part of the consideration of the said policy, was one providing * that the amount of loss, if any loss should occur under the policy, shall be ascertained and estimated by appraisers chosen as provided in said policy, and that no suit or action shall be maintained until the amount of loss is so ascertained and estimated by such appraisers. And this defendant avers that after the alleged loss by fire of the property named in the said policy occurred, that this defendant and the plaintiff herein mutually agreed that the amount of such loss should be ascertained by appraisers as provided in the said policy, and that said appraisal should have no effect upon the other provisions of said policy nor waive the rights of either party in the premises. And the defendant further avers that appraisers were chosen by each party as provided by the terms and conditions of said policy, and that said appraisal without any fault on the part of this defendant was still pending and undetermined at the time this suit was brought. (Pray judgment)

Replication

That he did not, after the alleged loss by fire of the property in question, make the agreement with the defendant as stated in said plea that said loss should be ascertained by appraisers as provided in said policy, and that said appraisal should have no effect upon the other provisions of said policy; nor did he agree that the rights of either party in the premises shall be waived. And plaintiff denies that under any such agreement appraisers were chosen by each party as provided by the terms and conditions of said policy, and that said appraisal was pending and undetermined at the time suit was brought, without any fault on the part of defendant.

1152 Arbitration under policy pending; plea (Ill.)

¹⁹² That the company shall not be liable beyond the actual cash value of the property at the time any loss or damage occurs, that the loss or damage shall be ascertained or estimated according to such actual cash value with proper deductions for depre-

¹⁹² Commence as in Section 1151 to star.

ciations, however caused, and shall in no event exceed what it would then cost the insured to repair or replace the same with material of like kind or quality; that such ascertainment or estimate shall be made by the assured and this company, or if they differ, then by the appraisers therein provided; that in the event of a disagreement as to the amount of loss the same shall be ascertained by two competent and disinterested appraisers, the assured and this company each selecting one and the two so chosen to select a competent and disinterested umpire; that the appraisers shall then estimate and appraise the loss stating separately sound value and damage, and failing to agree shall submit their difference to the umpire, and the award in writing of any two shall determine the amount of such loss; that the company shall not be held to have waived any provision or condition of this policy or any forfeiture thereof for any requirement, act or proceeding on its part relating to the appraisal, or of any examination therein provided for, and that the loss shall not become payable until days after the notice, ascertainment, estimate and satisfactory proof of the loss so required have been received by the company, including an award by appraisers when appraisal has been required; that no suit or action on said policy for the recovery of any claim shall be sustained in any court of law or equity until after full compliance by the assured with all the requirements of the said policy, among which requirements is the one above referred to providing that the amount of loss shall be ascertained by appraisers in case of disagreement between the insurer and the insured.

And this defendant avers that after the alleged loss by fire to the property named in the said policy, the insurer and insured endeavored to agree between themselves as to the amount of such loss, but this defendant avers that said parties were unable to agree upon the same, and that thereupon this defendant demanded that the amount of such alleged loss be ascertained by appraisers as provided in said policy.

And the defendant further avers that on, to wit, the day of, 19.., the plaintiff and this defendant each selected an appraiser as provided by the terms and conditions of the said policy, and agreed that said appraisers might fix the amount of the alleged loss. And this defendant further avers that without any fault whatever upon the part of this defendant, and without any connivance or collusion on the part of this defendant, the said appraisers were unable to agree upon the amount of the said loss up to the time of the bringing of this suit, and that the said appraisal was still pending and undetermined at the time said suit was brought, and still is pending and undetermined. (Pray judgment)

Replication

That after the making of the agreement between the defendant and the plaintiff to appraise said loss as is in said plea alleged, the said defendant was not without fault, connivance and collusion in being unable to agree upon the amount of said loss up to the time of beginning this suit, but the plaintiff avers that the said defendant, refused without good and sufficient cause to go on and complete said appraisement, and by neglect, delay and unfair action defeated such appraisement and the object and purpose for which said agreement for an appraisal of said loss was made, and that said appraisal was not still pending and undetermined at the time said suit was brought, and is not now still pending and undetermined for the reason aforesaid.

Plea b

That the said policy of insurance set out in said declaration herein contains certain conditions and provisions which are in the words and figures following: (Insert conditions relating to additional insurance and arbitration).

And the said defendant avers that at the time of the said alleged loss by fire, there was in force other insurance covering the said property in said policy described, to wit: a certain policy of insurance issued by the, insuring said property against loss or damage by fire, to an amount not exceeding dollars, and a certain other policy issued by the against loss and damage by fire, to an amount not exceeding dollars; which said policies and each of them were issued to the said F and N, the owners of said property in said policies described, which was the same property covered by the said policy in said declaration mentioned.

And the said defendant further avers that, after the happening of the said supposed loss or damage by fire, as in said declaration alleged, a disagreement arose between the said assured and the said defendant, as well as the said other insurance companies above mentioned, as to the amount of the said loss and damage to the property in said policies described; and thereupon, in pursuance of the terms of the said policy, the said insured, on, to wit, the day of, 19.., made and entered into a certain agreement in writing with the said defendant, joined by the said other insurance companies, wherein it was agreed that the said differences between the said insured and the said insurance companies, including this defendant, should be and were thereby submitted to arbitration, in accordance with the terms of the said policies, and that one D, and one S were therein named as the persons chosen and selected by the said parties who, together, should choose a third person to act with them before entering upon the appraisement of

the said property and the said supposed damage thereto, and that the said appraisers and umpire so appointed and selected should, thereupon, together, proceed to appraise said property and to ascertain and fix the immediate damage thereto caused by said alleged fire, as will more fully and at large appear from the said contract or agreement, bearing date the day last aforesaid.

And the said defendant further avers that afterwards, to wit, on the day last aforesaid, the said D and S made and entered into a certain agreement in writing, wherein it was mutually agreed that one L should act as the third person to be chosen by them, as provided by the said agreement hereinbefore referred to; and afterwards, to wit, on the day and year last aforesaid, in pursuance of the said agreement, the said D, S and L appraised the said property and made, executed, declared and published their certain award in writing, wherein and whereby the said damage upon said property in said policy described was fixed at the sum of \$., and it was in and thereby adjudged that said insurance companies and the said defendant should pay to the insured the said sum of (\$) dollars in pursuance of the said policies, as by the said agreements and each of them, bearing date, to wit, the day of, 19., and the said award bearing date, to wit, the day of, 19., reference thereto being had, will more fully and at large appear.

And the said defendant avers that the said property so as aforesaid covered by said policy of insurance in said declaration mentioned, or any part thereof, was not totally destroyed by the said alleged fire, but, on the contrary, avers that none of said property, or but a very small portion thereof, was damaged or destroyed by said fire, and that the said appraisement and award fixed and determined the whole amount of the loss and damage to all the property covered by the said policy of insurance, to wit,, at the time when, etc., to wit, at the county aforesaid, and so the said defendant says that the said appraisement and award fully and fairly fixed and determined the whole amount of the loss and damage sustained by said plaintiff on account of the said alleged fire.

And the said defendant further avers that due notice of said award was afterwards given to the said insured and to said defendant and to the said other insurance companies by said appraisers. That the said defendant, at all times had been and now is ready and willing to pay to the said F and N or to their legal assignee, its just proportionate share of the said award, in accordance with the terms of the said policy, to wit, the sum of dollars, and that the said award still remains and is in full force and effect, of all of which the said F and N and their assignee, the said plaintiff, have at all times had due notice: (Pray judgment).

Replication

That the appraisement and appraisal and award mentioned in said count in said defendant's plea, was in all respects irregular and improper, and that the same is a fraud either in fact or in law, and that it was made either fraudulently or with fraudulent intention, and works a fraud and injustice by reason of the gross errors committed by the appraisers therein, for the plaintiff says that unknown to the plaintiff the appraisers were guilty of fraudulent and unwarranted action in appraising (Describe property). That the (Describe property) damaged and appraised by the appraisers in this case was worth in the market at that time and that all the witnesses called before and examined by the said appraisers, being persons well versed in the kind, quality and market price of the said goods, testified before the said appraisers that the goods which they were then appraising were, at the time of the said fire, worth in this market, and that there were no other witnesses before the said appraisers who testified differently, and that after hearing said testimony, said appraisers, through fraud or mistake, fixed the value of said goods so by them appraised, at And plaintiff further avers that said appraisers were incompetent and were wholly unadvised as to the value of (Describe property) except from the evidence of the said witnesses given to the said appraisers as above set forth. And the plaintiff further says that said appraisement and appraisal and award, though fixed by the said appraisers and arbitrators, does not show in any measure or fix any price upon the amount of goods that was totally lost or consumed by fire, and that the said appraisal and award was only made and intended to apply and did apply to the goods in sight and which had been damaged by fire, and had no reference whatever to the goods totally destroyed. And the plaintiff further says that when the said F and N and the plaintiff, their assignee, discovered the fraudulent, irregular and improper character of the appraisal and award, they forthwith rightfully and properly refused to abide by the same, and thereupon gave notice to the defendant of said fact and made immediate demand for another and proper and just appraisal, which was by the said defendant refused and denied; and therefore the said appraisement and award does not remain in full force and effect, and the plaintiff and the assured justly refused to accept from the defendant its proportionate share of the said fraudulent and irregular award; and this the plaintiff is ready to verify, wherefore he prays judgment.

1153 Cancellation of policy, plea

That it is provided in said policy of insurance set out in plaintiff's declaration, among other things, as follows: "This

policy shall be canceled at any time at the request of the insured or by the company by giving days' notice of such cancellation. If this policy shall be canceled as hereinbefore provided or become void or cease, the premium having been paid, the unearned portion shall be returned on surrender of this policy or last renewal, this company retaining the customary short-rates; excepting that when this policy is canceled by this company by giving notice, it shall retain only the pro rata premium." And defendant avers that it did by and through its duly authorized agent,, give days' notice of the cancellation of the policy mentioned in plaintiff's said declaration, and did cancel said policy by a letter or notice in writing in the following words and figures, to wit: (Set out notice or letter).

And defendant further avers that said notice bearing date, 19.., was directed to, at ,, as aforesaid, who was then and there the agent and broker of the plaintiff and at that time and for a period long prior thereto, had in charge plaintiff's said insurance, and was duly authorized to attend to cancellation of said plaintiff's insurance, had frequently prior to the cancellation of this policy acted for and in behalf of the plaintiff in receiving and agreeing to the cancellation of other policies of insurance taken out by the said plaintiff through the said, while acting as agent and broker as aforesaid of the said plaintiff, all of which acts of the said the plaintiff and the defendant both had knowledge; that said notice, so directed to said aforesaid, thereby notified the plaintiff that the defendant had canceled the said policy of insurance; and that said letter or notice was placed in an envelope, which said envelope was plainly addressed to said, at, duly stamped and placed in the United States mail, which said letter or notice, in due course of mail, was received by the said, broker and agent of the plaintiff as aforesaid. And the defendant further avers that because of such letter or notice in writing, as aforesaid, sent as aforesaid, by the duly authorized agent of the plaintiff, and by the said duly received in due course of mail, said policy of insurance mentioned in plaintiff's declaration was then and thereby canceled; and that again, on, to wit,, defendant notified plaintiff confirming said cancellation and demanded a return of said policy. And defendant further avers that plaintiff never paid to defendant or any of its duly authorized agents, any part of the premiums in said policy mentioned, and that there was no unearned premium in the hands of the defendant to be returned to plaintiff, and therefore no tender of any was required. By reason whereof, defendant avers that plaintiff has no cause of action against defendant under said policy in said plaintiff's

declaration mentioned, for the loss of the property therein set forth; all of which defendant is ready to verify, etc.

1154 Causing fire, pleading

In Florida, an insurer has a right to plead that the fire was caused by criminal conduct of the insured or that the fixing of the insurable value was procured by fraud, notwithstanding the act of 1899; as the principal object of that act is merely to fix the measure of damages to be recovered in case of partial or total loss.¹⁹³

In Michigan the destruction of premises by the insured cannot be shown, unless specially pleaded or noticed.¹⁹⁴

1155 Causing fire, plea (District of Columbia)

That the plaintiff wilfully and fraudulently caused the fire which damaged and destroyed the personal property covered by the policy of insurance set out in plaintiff's declaration.

1156 Forfeiture, waiver

No new consideration is necessary to support the waiver of the right to forfeit an insurance policy; nor is it essential that the facts relied upon as a waiver shall constitute an equitable estoppel.¹⁹⁵

1157 Incumbrance, plea (Md.)

And for a plea to the count of the plaintiff's declaration that the policy of insurance herein sued on contained a condition as follows:

"This entire policy shall be void if the insured had concealed or misrepresented, in writing or otherwise, any material fact or circumstance concerning this insurance or the subject thereof; or if the interest of the insured in the property be not truly stated herein."

And that the interest of the plaintiff was not truly stated therein, as the said policy insured only the plaintiff, and prior to the time of the execution of said policy, the plaintiff had executed a mortgage on said property, to wit, a certain deed of

¹⁹³ *Hartford Fire Ins. Co. v. Redding*, 47 Fla. 235; c. 4677 Laws 1899 (Fla.).

¹⁹⁴ *Marley v. Liverpool & London & Globe Ins. Co.*, 92 Mich. 590, 592 (1892); *Residence Fire Ins. Co. v.*

Hannawold, 37 Mich. 103, 106 (1877).

¹⁹⁵ *Tillis v. Liverpool & London & Globe Ins. Co.*, 46 Fla. 268, 280 (1903).

mortgage in the amount of (\$.....) dollars, dated, 19.., and executed by and his wife, and said mortgage ever since said time has been upon said property; and the said plaintiff concealed from the defendant and misrepresented to the defendant said fact, at the time of the execution of said policy and prior thereto, and the defendant has not waived its rights thereunder, nor has any one authorized so to do, done so on behalf of said defendant.

Replication

That the mortgage referred to in said plea covers acres of land and was given when there were no improvements on said land, and the existence of said small mortgage was not a material fact or circumstance to the risk of this insurance; and that the plaintiff did not conceal the existence of said mortgage or make any misrepresentation concerning the same; and that there was attached to said policy a rider which contained the following provision: "Loss if any payable to assured as interest may appear."

1158 Iron safe clause, pleading

A breach of the iron safe clause in a policy is a matter of affirmative defense and must be specially pleaded.¹⁹⁶

1159 Limitation, waiver, proof

Waiver of a limitation clause in a policy is provable under the general issue where the declaration avers that the insurer by fraud or holding out reasonable hopes of an adjustment deterred the plaintiff from commencing his suit.¹⁹⁷

1160 Overvaluation, plea (District of Columbia)

That in and by the policy of insurance set out in plaintiff's declaration it was provided that it should be void in case of any fraud or false swearing by the insured touching any matter relating to the insurance, or the subject thereof, whether before or after a loss; and the defendant says that said plaintiff, on or about the day of, nearly months after date on which it is alleged the aforesaid personal property was destroyed by fire, appeared before one, a notary public in and for the District of Columbia and falsely and fraudulently made oath that the aforesaid personal property alleged to have been destroyed or damaged by fire, was of the value of, knowing

¹⁹⁶ Tillis v. Liverpool & London & Globe Ins. Co., 46 Fla. 279.

¹⁹⁷ Illinois Live Stock Ins. Co., v. Baker, 153 Ill. 240, 241 (1894).

full well at the time that said personal property was not worth that amount and was not worth the sum of dollars, the amount of the policy of insurance obtained from the defendant.

Plea b

That it was provided in and by the policy of insurance set out in plaintiff's declaration that it should be void if any material fact or circumstance concerning the insurance or subject thereof, had been concealed or misrepresented in writing or otherwise, by the plaintiff; and that, before said policy of insurance was issued by the defendant, the plaintiff knowingly and fraudulently, grossly overestimated the value of the personal property covered by said policy of insurance, and that the said fraudulent representation was a material and essential inducement to the issuance of said policy of insurance.

1161 Proof of loss, plea (District of Columbia)

That the plaintiff did not furnish proof of said loss on or about the day of, or at any other time, in such form as was acceptable to the defendant corporation, acting through its general agent; and the defendant further says that it did not, acting through its general agent, waive due and formal proof of said alleged loss as alleged in the count of plaintiff's declaration.

Plea b

That in and by the policy of insurance set out in plaintiff's declaration, it was provided that should a fire occur, the plaintiff should, within days thereafter, unless such a time be extended in writing by the defendant, render a statement to defendant, signed and sworn to by the plaintiff, stating his knowledge and belief as to the time and origin of the fire; his interest and that of all others in the property; the cash value of each item and the amount of loss thereon; all incumbrances thereon; all other insurance, whether valid or not, covering any of said property; a copy of all the descriptions and schedules in all policies; any changes in title, use and occupation, location, possession or exposure of said property, since the issuance of said policy; by whom and for what purpose any building therein described, and the several parts thereof, were occupied at the time of the fire. And the defendant says that, notwithstanding said condition of said contract and, in direct violation thereof, said plaintiff has never rendered such sworn statement as required by said condition, and the time limited for the rendering of same has expired and was not extended, in writing or otherwise, by the defendant.

(Illinois) *Plea*

198 That if fire occurs the insured shall within days after the fire, unless such time is extended in writing by the company, render a statement to the company, signed and sworn to by said insured, stating the knowledge and belief of the insured as to the time and origin of the fire; the interest of the assured and all others in the property; the cash value of each item thereof, and the amount of loss thereon; all incumbrances thereon; all other insurance, whether valid or not, covering any of said property; a copy of all the descriptions and schedules in all policies; any changes in title, use, occupation, location, possession, or exposure of said property since the issuing of said policy; by whom and for what purpose, any building described in said policy, and the several parts thereof, were occupied at the time of the fire; and said policy further provides that no suit or action thereon for the recovery of any claim shall be sustainable in any court of law or equity until the full compliance by the assured with all the requirements of said policy, among which requirements is the one requiring the above statement to be rendered within days after the fire. And the defendant avers that the plaintiff did not within days after the alleged fire render such statement to this defendant; and it further avers that the time for rendering said statement was not extended in writing by this defendant. (Pray judgment)

Replication

That true it is that he did not render to said company the said statement in said plea mentioned within days after the fire, because he says that before the expiration of the said days from the said fire the company sent its adjuster to investigate said loss, and that the said adjuster did proceed to and enter upon the adjustment of said loss with the plaintiff, and continued in an effort to settle and adjust such loss with plaintiff until after the expiration of the said days, to wit, on the day of, 19.., and that thereupon the said defendant requested of the plaintiff that he furnish defendant such proof of loss as mentioned in said plea and that thereupon, and within days thereafter, to wit, upon the day of, 19.., said plaintiff furnished to said defendant in pursuance of such request, such proof of loss, and that then and there the said defendant received and accepted the same as satisfactory and has since retained the same without objection, and now has the same; wherefore the plaintiff

198 Commence as in Section 1151 to star.

avers that the said defendant by reason thereof, waived the presentation of said statement within the days succeeding the said fire.

(Maryland) *Plea*

And for a plea to the count of the plaintiff's declaration, that the policy of insurance sued on contained a condition requiring the insured, within sixty days after the fire, unless such time is extended in writing by the company, the defendant herein, to render a statement to the company signed and sworn to by the plaintiff, stating the knowledge and belief of the insured, the plaintiff, as to the time and origin of the fire; the interest of the insured and of all others in the property; the cash value of each item thereof, and the amount of loss thereon; all incumbrances thereon; all other insurance, whether valid or not, covering any of said property; a copy of all the descriptions and schedules in all policies; any changes in the title, use, occupation, location, possession, or exposures of said property since the issuing of this policy sued on; by whom and for what purpose any building described in the policy sued on, and the several parts thereof, were occupied at the time of the fire; but the plaintiff did not, within sixty days after the fire, nor did anyone in his behalf, render a statement signed and sworn to by him, containing the things as above stated required to be therein, nor any statement whatsoever, and the said time of sixty days was not extended in writing by this defendant, and the rendering of such statement has not been waived by this defendant, or by anyone in its behalf authorized so to do; and by said policy the rendering of said proofs to it as so provided for was made a condition precedent to any suit or action thereon, and the amount of the defendant's liability, if any, was to be determined from the said proofs of loss, and said amount of liability, if any, was to be payable not until sixty days after the defendant had received satisfactory proofs of loss as herein referred to, and as referred to in said policy.

Replication

1. That the plaintiff was prevented from furnishing and filing the proofs of loss or statement referred to in said plea by the acts and conduct of the defendant and its adjuster.

2. That the filing of the proofs of loss or written statement referred to in said plea was waived by the acts and conduct of the defendant and its adjuster.

1162 Refusal, reasons

In defending an action on a policy, the insurance company is not limited by the reasons assigned in its refusal to pay, if the

plaintiff has not been misled or influenced to his or her injury by the omission or failure to set forth other reasons.¹⁹⁹

1163 Suspension of policy, plea (Md.)

That it does not owe the said sum of (\$.....) dollars or any part thereof, to the plaintiff, because one of the conditions upon which the said defendant insured the property of the plaintiff, under its said policy No., as will appear by reference to said policy, was that the plaintiff should pay in advance the annual interest on a certain note of hand, dated the day of, ..., referred to in the plaintiff's declaration, said payment to be made within days after the in, in each and every year while the policy was in force; and upon the further condition that in default of such payment the said policy should be suspended and not be considered as binding on the defendant, until the payment of said interest be made by the plaintiff; and the defendant says the plaintiff did not pay, within days after the in of the year, nor has he at any time paid, the said annual interest on the said note of hand for the year; by reason of which the said policy was at the time of the destruction of the said insured property, suspended and not binding on the defendant.

Replication

That said defendant does owe the said sum of (\$.....) dollars or any part thereof to the plaintiff because there are conditions in said policy No. that modify the alleged effect of the one condition in said policy referred to by the defendant in said plea, as will appear by reference to said policy, and said policy never was suspended and always was and still is binding on the defendant; and the plaintiff says that he or his agent did within days after the day of in the year 19.., or at some time did pay the said annual interest on the said note of hand for the year 19.., and that at the time of the destruction of the said insured property said policy was not suspended and was binding on the defendant.

1164 Unconditional ownership, plea (Ill.)

²⁰⁰ That the entire policy unless otherwise provided by agreement endorsed thereon or added thereto, should be void if the interest of the assured be other than unconditional and sole

¹⁹⁹ *Weston v. State Mutual Life Assurance Co.*, 234 Ill. 492, 501 (1908).

²⁰⁰ Commence as in Section 1151 to star.

ownership in the property covered by the policy; and this defendant avers that the plaintiff herein was not the sole and unconditional owner of the property named in the said policy at the time said policy was issued or at the time of the alleged loss; and it further avers that this defendant did not at any time by agreement endorse upon said policy or add thereto assent to the said policy applying to a less interest of the plaintiff than unconditional and sole ownership. (Pray judgment)

Replication

That at the time of issuing the said policy of insurance, and at the time of the loss thereunder, as aforesaid, he was the sole and individual owner in fee simple of the premises on which said building was situated, except as to deed of trust thereon then known to the defendant as being thereon and recognized in said policy of insurance, and that said policy was so issued to the plaintiff by the defendant then knowing that said trust deed then covered said premises and was a lien thereon.

Plea b

That it is further provided in said policy of insurance, set out in said declaration, among other things, as follows: "This entire policy, unless otherwise provided, by agreement endorsed hereon, or added hereto, shall be void * * * if the interest of the insured be other than unconditional and sole ownership."

And the said defendant avers that unknown to it at the date of the issuance of the policy in said plaintiff's declaration mentioned, the ownership of the said defendant in and to the property in said declaration mentioned, was not that of unconditional and sole ownership, but on the contrary thereof, the ownership of said property in plaintiff's declaration mentioned, at the date of said policy, and since, was and is encumbered, in and by a certain instrument in writing made and executed and delivered by said plaintiff, on, to wit,, between said plaintiff and one, and said ownership was and is thereby liable in and by the terms of said instrument, to be changed upon the happening of certain events and upon certain conditions; and defendant avers that afterwards, to wit,, said took possession of the premises and property in said policy mentioned, and remained in possession thereof, until its destruction by fire; by reason whereof, defendant avers, that under the provisions of said policy in said plaintiff's declaration set forth, said policy became void and said plaintiff has no cause of action against defendant under said policy, for the loss of the property therein set forth; all of which defendant is ready to verify, etc.

Replication

That at the date of the issuance of the said policy, in the said declaration set forth, the interest of the said plaintiff in the property insured was that of unconditional and sole ownership.

(Maryland) Plea

And for a plea to the count of the plaintiff's declaration, that the policy of insurance sued on herein contained a condition as follows:

"This entire policy, unless otherwise provided by agreement endorsed hereon or added hereto, shall be void if the interest of the insured be other than unconditional and sole ownership."

And that the interest of the insured in said buildings covered by said policy of insurance was other than unconditional and sole ownership, in that the plaintiff owned the property with his wife,, as joint tenants, or tenants in common, or tenants by the entireties, and it was not provided otherwise by any agreement endorsed on said policy or added thereto, and the defendant has not waived its rights hereunder, nor has any one authorized so to do, done so in its behalf.

Replication

That the defendant's agent who secured said insurance and wrote said policy asked no questions about the ownership of the property, and the plaintiff made no representation about the same. That while it is true that the ground belongs to the plaintiff and his wife as tenants by the entireties that the improvements thereon, the houses, were erected with this plaintiff's money, and the policy contains the following endorsement: "Loss if any payable to assured as interest may appear."

1165 Vacant and unoccupied, plea (Ill.)

That at the time of the alleged loss by fire to the property described in the policy set forth in the declaration herein, the building described in said policy was vacant and unoccupied, and so remained unoccupied for days prior to the alleged loss.

Replication

That the policy in said plea mentioned, as set out in said declaration, shows that said insurance was placed on an ice house of the plaintiff, and the plaintiff avers that the said defendant, when it issued and placed said policy on said ice house, understood that it only required such occupancy of said building as pertained to the ordinary use of the building in the

manner and for the purpose for which it was designed to be used; that the said building, when destroyed by fire, as aforesaid, was used as an ice house, and that it was occupied in such manner as pertained to the ordinary use of buildings used for ice purposes, and as the same by the intent of said policy was designed, by the said plaintiff and defendant to be used when said policy was placed thereon.

(Maryland) *Plea*

And for a plea to the count of the plaintiff's declaration, the defendant says that the policy of insurance sued on in this case contained a condition as follows:

"This entire policy, unless otherwise provided by agreement endorsed hereon or added hereto, shall be void * * * if a building herein described, whether intended for occupancy by owner or tenant be or become vacant or unoccupied and so remain for ten days."

And the defendant says that the building described in the policy of insurance mentioned in the plaintiff's declaration was a dwelling house which became vacant or unoccupied, and so remained, for more than ten days prior to its destruction by fire, and said building was vacant or unoccupied at the time of its destruction by fire; whereby the whole policy was rendered void, there being no provision to the contrary by agreement endorsed on or added to the policy.

Replication

That the building described in the policy of insurance mentioned in the plaintiff's declaration did not become vacant or unoccupied and did not remain so for more than ten days prior to its destruction and was not vacant or unoccupied at the time of its destruction by fire as said defendant has in its plea alleged.

Plea b

And for a plea to the count of the plaintiff's declaration that the policy of insurance sued on by the plaintiff herein contained a condition as follows:

"This entire policy, unless otherwise provided by agreement endorsed hereon or added hereto, shall be void if the building herein described whether intended for occupancy by owner or tenant be or become vacant or unoccupied and so remain for ten (10) days."

And a further condition as follows:

"And warranted by the assured that this building shall be occupied by a family during the life of this policy, which shall not be construed as meaning the occupancy of an apartment

or apartments by a man or men and which, however, shall not prejudice assured's right to the ten (10) days' vacancy permitted by the conditions of this policy."

And that while the said policy was in force the buildings described therein were vacant and unoccupied and remained so for more than ten (10) days and the said buildings were not occupied by a family or families, and had never been occupied by a family or families as required by said clauses in said policy, and it was not provided otherwise by any agreement endorsed on said policy or added thereto, and the defendant has not waived its rights hereunder, nor has any one authorized so to do, done so in its behalf.

Replication

For replication to the plea, the plaintiff says, that the houses covered by the policy of insurance sued on in his case were in course of construction at the time the policy was issued; that the defendant's agent saw them and knew it, and there was no misrepresentation in regard thereto; and that the fire occurred before they were completed and ready for occupancy, and the policy contained the following endorsement:

"Permission to make alterations, additions, completions and repairs and this policy to cover materials on premises for making same."

1166 Warranties, pleading

All promissory warranties and conditions subsequent are matters of defense which must be pleaded by the defendant if relied upon; as it is not necessary for the plaintiff to anticipate such defenses and to negative them.²⁰¹ An iron safe clause in a policy is a promissory warranty in the nature of a condition subsequent within the meaning of the foregoing rule.²⁰²

1167 Indemnity bond obtained by false representations; plea (Ill.)

That at the time of the giving by said defendants to said, as sheriff, of the said indemnity undertaking in said count mentioned, it was represented by the said, sheriff, as aforesaid, to the defendants, that he, the said, as sheriff of the county of, in the territory of, had by virtue of a certain writ of attachment for the sum of, issued in a suit then pending in the

²⁰¹ Tillis v. Liverpool & London & Globe Ins. Co., 46 Fla. 278.

²⁰² Tillis v. Liverpool & London & Globe Ins. Co., *supra*.

district court for the judicial district within and for the said county of, territory of, wherein these defendants were plaintiffs and the said, co-partners trading as, were defendants, had seized certain personal property, dry-goods, and clothing, of about the value of, for the purpose of selling the same and satisfying said debt, and that claimed to have the right of possession to said property by virtue of a chattel mortgage thereon, and had demanded the delivery of the same to him; that said indemnity undertaking in said count mentioned was executed and delivered by the defendants to said in consideration of the truth of such statements, and for the purpose of indemnifying the said sheriff from loss by reason of his retaining possession of such personal property, dry-goods and clothing, and selling the same under proceedings in said suit against said, and paying the proceeds of such sale over to the defendants in satisfaction of their said debt.

And these defendants further aver that the said statements and representations upon which the delivery of said indemnity undertaking was conditioned, were not true in this, that said, sheriff, had not seized and did not have in his possession certain personal property, dry-goods and clothing of the value of under said writ of attachment issued in favor of the defendants, but on the contrary did have in his possession certain personal property, dry-goods and clothing of the value of, to wit,, seized and taken possession of by the said, as sheriff, under a writ of attachment in favor of and against said, issued out of said district court for the judicial district within and for the county of, and territory of; nor did the said, as such sheriff, sell said certain personal property, dry-goods and clothing represented by him to have been seized and in his possession under the writ of attachment in favor of the defendants and against, of the value of about, and pay the proceeds of the same to the defendants in satisfaction of their said debt against, although such proceedings were had in said suits of the defendants against that the defendants obtained judgment against for the amount of their said debt and judgment sustaining their said attachment writ against said, but wholly failed so to do; that the defendants have not received from the said, sheriff, or from anyone in his behalf, any part or portion of the proceeds of any sale of such goods, nor has any part or portion of their said claim and demand against been satisfied by the said, sheriff, by virtue of such sale and such application of the proceeds thereof or otherwise; nor did said pay any judgment, interests, cost or expenses by reason of retaining possession of and selling any

goods or merchandise under proceedings instituted by defendants wherein said supposed indemnity set forth in plaintiffs' amended count was given. (Pray judgment)

Replication

That at the time of the giving by the said defendants to said, as sheriff, of the indemnity undertaking in said count of said declaration mentioned, it was not represented by said, sheriff, as aforesaid, to the defendants that he, the said, as sheriff, by virtue of a writ of attachment issued in a suit then pending in the district court for the judicial district within and for said county of, territory of, wherein the said defendants were plaintiffs and said and, co-partners trading as, were defendants, had seized personal property, dry-goods and clothing of about the value of; that the said did not make any untrue statements and representations upon which the delivery of said indemnity undertaking was conditioned; and that said, sheriff, as aforesaid, did not have in his possession certain personal property, dry-goods and clothing of the value of, to wit,, seized and taken possession of by said, as sheriff, under a writ of attachment in favor of and against, issued out of said district court for the judicial district, within and for the county of, territory of; that said, sheriff, as aforesaid, did pay a judgment, interest, costs and expenses by reason of retaining possession of and selling the goods and merchandise seized under the proceedings instituted by the defendants herein, wherein said indemnity undertaking set forth in said count of the declaration herein, was given.

1168 Indemnity bond obtained by fraud; plea (Ill.)

That the said indemnity undertaking in said count mentioned was obtained from these defendants by the said, sheriff, as aforesaid, by fraud and circumvention, that is to say, colluding and conspiring to injure and defraud these defendants, before the execution of the said writing, to wit, on the day of, in the county aforesaid, the said, sheriff, as aforesaid, falsely and fraudulently then and there represented to these defendants that he then held and had in his possession certain dry-goods, clothing and personal property of about the value of, under and by virtue of a certain attachment writ issued in the case of these defendants against and, co-partners trading as, for the purpose of satisfying the debt of the defendants against said,

amounting to the sum of, and that the said goods were then claimed by under and by virtue of a chattel mortgage, and that he had demanded a delivery of the said goods to him, the said, and that he, the said, sheriff, should deliver the same to said unless the defendants should execute and deliver the said indemnity undertaking in said count mentioned; and these defendants confiding in the false and fraudulent representations aforesaid then and there executed and delivered to the said the said indemnity undertaking, conditioned on the premises aforesaid and without any other consideration whatsoever.

Defendants further aver that the said, sheriff, did not then and there have and retain possession of dry-goods, clothing and personal property of about the value of, but did have in his possession and had levied on, contrary to the instructions and without the knowledge or consent of the defendants, a large amount of property greatly in excess of the value of, and pretended to hold a portion thereof under and by virtue of other attachment writs in his possession, and that all the said property so held by said sheriff as aforesaid, was of the value of, to wit,, which said sum was more than sufficient to have satisfied in full the debts for which attachment proceedings were brought and the said claim of said; but, said sheriff, colluding and conniving with the said and the said, without the knowledge or consent of said, did release and surrender to said an amount of property largely in excess of the amount sufficient to satisfy the debt of the defendants, to wit, the amount of the value of, and did thereafter fail and refuse to satisfy the debt, or any part thereof, of these defendants, from the proceeds of any of the goods and merchandise retained by him in his possession as such sheriff, although the defendants obtained judgment sustaining their attachment for the amount of their said debt against (Pray judgment).

Replication

That said indemnity undertaking in said count mentioned was not obtained from the defendants by the said, sheriff, as aforesaid, by fraud or circumvention, and that he did not collude or conspire to injure and defraud the defendants before the execution of said writing, to wit, on the, 19..; that the said, sheriff, as aforesaid, did not make any false and fraudulent representations to the said defendants; that the said did not then and there levy on any property of the said contrary to the instructions and without the consent of the defendants; that the said, sheriff, as aforesaid, did not collude and connive with the said, and that the

said, sheriff as aforesaid, did not unlawfully release and surrender any property to said with the consent of said

1169 Indemnity bond, sheriff's failure to follow instructions; plea (Ill.)

That at the time of the delivery by the defendants to the said, as sheriff, of the supposed indemnity undertaking in said count set forth, the said, as sheriff, had in his possession a stock of goods consisting of dry-goods, clothing and sundries, which said stock of merchandise the said, as sheriff, under and by virtue of the laws of the then territory of, had caused to be inventoried and appraised at the sum of, to wit,, and said merchandise was then and there of that value; that said stock of merchandise which the said, as such sheriff, held in his possession at the time of the giving of said indemnity undertaking in said count mentioned, had been previous thereto, and on, to wit, the seized and taken possession of by the said, as such sheriff, under and by virtue of writ of attachment issued out of the district court for the judicial district of the county of, in the territory of, in favor of against; that afterwards and on, to wit, the, there was issued out of said district court for the judicial district within and for the county of, in the territory of, another writ of attachment for in favor of these defendants and against the said, which said writ was also delivered to the said, as sheriff, and a levy endorsed thereon on certain of the property then in his possession as aforesaid.

Defendants further aver that the said indemnity undertaking in said count mentioned and described was given to said, as sheriff, solely and only for the purpose of indemnifying the said, as sheriff, from such claims, costs, charges, trouble and expense, as he should be put to by reason of the levy upon or sale of about worth of said merchandise so in his possession, which he was then and there directed to separate and hold as security for the payment of the attachment writ in favor of the defendants against, as aforesaid, and to discharge and release and surrender all the remainder of said merchandise from any claim, demand or lien whatever of the said defendants by reason of their said attachment writ.

Defendants further aver that the said, as sheriff, instead of setting apart merchandise of the value of about, as directed and instructed, to secure the demand of the defendants and against, and after judgment

in favor of the defendants and against upon said demand which was afterwards entered in said court, and instead of selling the goods so selected and paying the proceeds thereof to the defendants, the said, as sheriff, in violation of his instructions and the condition upon which the said undertaking indemnity was executed and delivered to him, retained in his possession the entire stock of goods and merchandise so seized by him originally under the writ of attachment in favor of and sold same under that writ; that the said judgment in said court mentioned as having been entered in favor of and against the was a judgment rendered by the district court for the judicial district within and for the county of, territory of, for and costs, that being the amount of the lien claimed by the said upon said stock of goods; that said, as such sheriff, violated the said conditions upon which said undertaking of indemnity was delivered to him, by the defendants, and retained possession of the entire stock of goods in his hands of his own wrong and not by reason of said indemnity undertaking, and did not account to or pay to defendants any of the proceeds from the sale thereof by him. (Pray judgment)

Replication

That at the time of the delivery by the defendants to said, as sheriff, of the indemnity undertaking in the count of said declaration mentioned and set forth, the said, as sheriff, did not have in his possession a stock of goods which the said sheriff had caused to be inventoried and appraised at the sum of, to wit,; nor did the said, sheriff, as aforesaid, have in his possession any stock of merchandise on the date aforesaid of the value of said sum of; nor was any such stock seized by the said sheriff, as aforesaid, on the day of, by virtue of a writ of attachment issued out of the district court for the judicial district of the county of, in the territory of, in favor of and against; that the said indemnity undertaking in said count of said declaration mentioned and described was not given to said, as sheriff, solely and only for the purpose of indemnifying said, as sheriff, from such claims, costs, charges, troubles and expense as he should be put to by reason of the levy upon or sale of about worth of said merchandise; that said, sheriff, as aforesaid, was directed by the defendants to levy on goods, wares and merchandise to an amount greatly in excess of said sum of, to wit, the sum of; that he was not then and there directed to separate and hold said merchandise so

levied upon by him for the payment of the attachment writ in favor of the defendants and against; and the said, sheriff, as aforesaid, was not instructed to discharge, release and surrender any part of the stock of said from any claim, demand or lien whatever of said defendants by reason of their said attachment writ; that said, as sheriff, as aforesaid, did not retain in his possession the entire stock of goods and merchandise of said; and that said entire stock of goods and merchandise of said was not seized by him, said, as sheriff, as aforesaid, under writ of attachment in favor of; and that said, as such sheriff, did not violate the conditions upon which said undertaking of indemnity was delivered to him.

1170 Joint liability; denial, plea (Ill.)

That he is not, nor ever was jointly liable with the said in respect of said several supposed causes of action in the said declaration mentioned or either of them in manner or form as the plaintiff has above in that behalf alleged; and of this he, the said, puts himself upon the country.²⁰³

1171 Joint liability or partnership; denial, plea (Ill.)

That ..he.. not, or ever w... partner.. with, and jointly liable with the said C in respect of the said cause of action in the said declaration mentioned in manner and form as the plaintiff.. ha.. above in that behalf alleged; and of this ..he..., the said D, put... ..sel..... upon the country, etc.

(Venue)

The said D, defendant, make.. oath and say.. that the last foregoing plea is true in substance and in fact.

Subscribed, etc.

LIFE INSURANCE

1172 Beneficiary, warranty

The statement that a beneficiary bears a certain relation to the insured is not a warranty, but it is merely a direction for the payment of the insurance money.²⁰⁴

1173 Deductions

An insurer has no right to deduct a general indebtedness of the insured from a policy which provides that "any indebtedness to the company will be deducted in any settlement," as the

²⁰³ Add verification.

²⁰⁴ *Cunat v. Ben Hur*, 249 Ill. 448, 450 (1911).

indebtedness which is deductible under the provision is that which arises by virtue of the terms of the policy itself.²⁰⁵

1174 Execution of assured

The execution of the assured for crime is no defense against an action by his legal representative, upon a life insurance policy held by the person executed, in the absence of a stipulation exempting the company from liability for a death from this cause.²⁰⁶

1175 False representations, generally

To avoid a contract of insurance on the ground of false swearing to a statement, the statement must have been made knowingly and intentionally with the knowledge of its untruthfulness, or it must have been so stated as a truth when the party did not know it to be true and had no reasonable grounds for believing it to be true and must have been made with the purpose to defraud.²⁰⁷

1176 False representations, plea (Ill.)

That prior to the making of the policy referred to in the declaration, and as an inducement thereto, said made to said defendant, his application for insurance in writing, a copy of which application is appended to said policy, and the defendant refers to the copy of said application annexed to the plaintiff's declaration herein, and by express reference makes it a part of this plea.

Defendant further avers that the statements in said application were false in this, that said had suffered at divers times preceding the making of said application, from and other serious ailments, which fact was then and there known to said

Defendant further avers that it relied upon the statements in said application for insurance and was induced thereby to issue said policy; by reason whereof defendant says said policy became and was null and void. (Pray judgment)

Replication

That the said statements in the said application in said plea mentioned were fairly and honestly made by the said, according to his best knowledge and belief and were true in

²⁰⁵ Anson v. New York Life Ins. Co., 252 Ill. 369, 372 (1911).

²⁰⁶ Collins v. Metropolitan Life Ins. Co., 232 Ill. 37, 48 (1908).

²⁰⁷ German Union Fire Ins. Co. v. Cohen, 114 Md. 130, 137 (1910).

fact and were not false or untrue and were not known to the said to be false or untrue and were not relied upon by the said defendant as in said plea of the said defendant mentioned in manner and form, etc.

(Maryland) *Plea*

(Precede this by general issue and proper commencement.)

That, the insured, induced the defendant to issue the policy which is the cause of action in this case by falsely and fraudulently representing at the time of his application therefor that he was in good health, when in truth and in fact he was not then, nor when the policy was issued in good health, but was at those times, as well as for some time prior thereto afflicted with disease, a disease which tends to shorten human life.

And for a plea says:

That the said made other false and fraudulent representations in the written application made by him as an inducement to issue the policy which is the cause of action in this case, which representations were matters material to the risk assumed by the defendant in issuing said policy.

(Virginia) *Plea*

That at and before the time of delivery of the policy sued upon, it was understood and agreed between the insured, and the defendant in a certain contract in writing, called application, signed by the insured, that the statements and answers contained in said application were correct and wholly true, and that they formed a basis of the contract of insurance, and that if they were not correct and wholly true the policy should be null and void. And the defendant says that the applicant did fraudulently and knowingly make a false statement in said application in this, to wit, that he was then in sound health, and that he had no physical or mental defect or infirmity of any kind. And the said defendant says that the said statement was wilfully false and was fraudulently made in this, that the said applicant had at that time and prior to hereto been afflicted with a disease of the kidneys and had been treated therefor; that the said statement was material and caused the company to issue the policy sued upon, and that but for such statement the policy would not have been issued; and the defendant had no knowledge of the falsity of said statement.

And the said defendant is ready to verify.

(Venue)

I,, a notary public in and for the corporation aforesaid, in the state of, do hereby certify that, superintendent of, the defendant

in the above styled suit, appeared before me in my corporation and state aforesaid and made oath that the statements contained herein are true to the best of his knowledge and belief.

Given, etc.

1177 Forfeiture, waiver

A cause of which the insurer had knowledge at the time the policy was issued cannot be made the basis of a forfeiture of the policy after it had been issued.²⁰⁸ The acceptance of payment of a premium after it has become due waives the insurer's right to insist upon a forfeiture of the policy for failure to pay promptly, and restores the parties to the contract as it was originally made without creating a new contract between them. This is the rule in Georgia, Illinois and Iowa, but not in New York and Tennessee.²⁰⁹ A forfeiture of a policy may be pleaded in an action thereon, although there is no declaration of forfeiture, as no notice of forfeiture is required to be given.²¹⁰

A tender, under a denial of all liability, of all unearned premium does not invalidate the tender, but the insured is bound to accept such a part of the tender as the insurer can lawfully make.²¹¹

An insurance company does not waive its right to insist upon a forfeiture of the policy for a breach of a condition in it by the mere failure to return the unearned premium after the forfeiture has occurred, unless a demand is made upon the insurance company for a return of such premium and the insured has offered, at the same time, to surrender the policy.²¹²

1178 Good standing

In an action on a certificate of life or accident insurance under the assessment plan, the question whether the assured was in good standing in the original company at the time of a transfer or in the transferee company at the time of his death, is a matter of defense.²¹³

²⁰⁸ *Peterson v. Manhattan Life Ins. Co.*, 244 Ill. 329, 341 (1910).

²⁰⁹ *Monahan v. Fidelity Mutual Life Ins. Co.*, 242 Ill. 488, 493 (1909).

²¹⁰ *Rose v. Mutual Life Ins. Co.*, 240 Ill. 45, 54 (1909).

²¹¹ *Aetna Ins. Co. v. Mount*, 44

So. 162; 45 So. 835 (Miss. 1907, 1908).

²¹² *Aetna Ins. Co. v. Mount*, 44 So. 162.

²¹³ *Brown v. Mutual Reserve Fund Life Assn.*, 224 Ill. 576, 578 (1907).

1179 Incontestability

A policy is incontestable from the date of its issuance under a provision declaring the policy incontestable from the date thereof and a later clause providing that the policy shall not be in force until actual payment of the initial premium and the delivery of the policy. This is so on the principle that between two conflicting provisions that construction of them will be adopted which is more favorable to the insured.²¹⁴

1180 Limitation, plea (Ill.)

That it, the said defendant, is a voluntary, mutual association organized under that certain law of the state of Illinois, approved on the day of, 19.., entitled: "An act to provide for the organization and management of corporations, associations or societies for the purpose of furnishing life indemnity or pecuniary benefits to the beneficiaries of deceased members, or accident or permanent disability indemnity to members thereof;" that the members of said association receive no money as profits, and the funds for the payment of all benefits and indemnities promised and paid by said association are raised entirely by assessment upon the surviving members; that said association has no authority to insure any person or to promise any benefit or indemnity to any person not a member of said association; that said association is by law and its charter authorized to issue, and does issue to its members only, certificates entitling its said members to receive benefits in case of certain accidents only, and upon certain conditions only; that by the acceptance of such certificates and the payment therefor of the sum or sums required by said association, the party so accepting said certificate and paying said sum or sums becomes and is a member of said association, and subject to all the rules and regulations lawfully governing the members of said association; that for the purpose of defining said accidents and fixing said conditions and otherwise regulating and prescribing the business of said association, and the relations of its said members to said association and to each other, the said members of said association have duly adopted certain rules, limiting and defining the accidents for which indemnity payments shall be made by said association, and assessments levied upon its said members, and fixing the conditions upon which said payments shall be made, and otherwise regulating and prescribing the business of said association and the relations of its said members to said association and to each other, which said rules so adopted by the members of said association are

²¹⁴ Monahan v. Fidelity Mutual Life Ins. Co., 242 Ill. 488, 492 (1909).

known as the by-laws of said association; that in and by said by-laws so adopted by the members of said association as aforesaid, it is provided as follows, to wit: (Set out by-law restricting the commencement of suits).

And the said defendant avers that the said by-law hereinbefore set out was duly adopted by the members of said association on or before the day of, 19.., and is and has been ever since said day of, 19.., and particularly on, to wit, the day of, 19.., in full force and effect. And this defendant avers that on, to wit, the day of, 19.., the said F made his application for membership in said accident association in words and figures as follows, to wit: (Set out application).

And said defendant avers that said F signed said application and caused the same to be delivered to the said defendant on said day of, 19..; and thereupon, on said day of, 19.., the said defendant, in consideration of the warranties and agreements contained in said application, issued to said F its certificate of membership in said association, in and by which certificate it was provided as follows, to wit: (set forth certificate); and said defendant then and there thereby received the said F into membership in said association, and the said F thereby became a member of said association and entitled to all the rights and benefits and subject to all the duties, obligations and liabilities of members of said association. In and by said certificate it was further provided as follows, to wit: (Set out provision). And said defendant avers that said certificate, together with said application and said by-laws, is the only certificate ever issued by said defendant to said F, and is the only policy of insurance or contract of any sort ever entered into by said defendant with said F; and said defendant avers that said contract was made and said certificate was so issued and said F became a member on said day of, 19.., and while said by-law above set out was in full force and effect.

And said defendant avers that on, to wit, the day of, 19.., it, the said defendant, duly and explicitly refused to entertain the claim of said plaintiff, and on said date last before mentioned, duly notified said plaintiff that it, the said defendant, refused to entertain the said claim of said plaintiff. And said defendant avers that the said plaintiff did not commence her said suit against it, the said defendant, within thirty days of said date of said refusal as aforesaid, but not until, to wit, the day of, 19.., to wit, days after the date of said refusal as aforesaid, in manner and form as the plaintiff has above complained against it, the defendant; and this the defendant is ready to verify, wherefore it prays judgment if the plaintiff ought to have her aforesaid action against it, etc.

Replication

And the plaintiff as to the special plea of the defendant by it secondly above pleaded says that there never was any such by-law in force or effect as stated by the said defendant in the said plea. And that said defendant did not reject the claim of said plaintiff and refuse to pay the same as stated in defendant's said plea; and of this the plaintiff puts herself on the country.

b

And for a further special reply the plaintiff says that she, by reason of anything in that plea alleged, ought not to be barred from having her aforesaid action, because, she avers, if ever there was any such by-law as stated in the said amended plea, she was prevented by the fraud and false representations of the defendant by its servants from bringing her action within the time prescribed by the said alleged by-law, as stated in the said plea, and she was also prevented by the fraud, covin and concealment of the defendant from obtaining any knowledge of the said alleged by-law. That is to say, that before the commencement of this suit, to wit, the of, 19.., the plaintiff went to the office of the said defendant and requested the said defendant to furnish her with blank forms to make proof of loss and also with a copy of the by-laws; but this the defendant refused to do. And the defendant then and there by its servant, with the intention of deceiving the plaintiff, falsely and fraudulently stated to the plaintiff that she had three months from the date of the death of said F to bring suit. And the plaintiff avers that she never saw any by-law of the said defendant until long after this action was commenced. And she further avers that she believed the statement of the defendant, wherein it stated by its servant that she had three months to bring her suit, and relying on this statement, she brought her suit on the day of, 19.., as stated in said plea, and which was within three months of the death of the said F. And the plaintiff further says that the statement of the defendant was falsely and fraudulently made, and made for the purpose of deceiving her and that it did deceive her. (Pray judgment)

1181 Medical attention, plea (Md.)

And for a plea, that the plaintiff, in his application for the issuance of the policy of insurance mentioned in the declaration, made the statement that he had not received medical attention within two years preceding the making of said application, which said statement said plaintiff warranted to be true, and which said statement was expressly made a part of the contract of insurance and was relied on by the defendant;

whereas, in fact, the said plaintiff had received medical attention within two years preceding the making of said application, as he well knew. And this defendant further says that these facts constitute a breach of warranty as to a matter material to the risk and avoid the policy.

Replication

That he had not received medical attention within two years preceding the making of said application, and that he had made no statement in his application for the issue of the policy of insurance mentioned in the declaration which would constitute a breach of warranty as to a matter material to the risk and in avoidance of the policy.

Rejoinder

The defendant, the of,
for rejoinder to the plaintiff's replications to the
and pleas, says:

That it joins issue on the same.

1182 Murder of insured, plea (Ill.)

That the plaintiff, A, was the son and beneficiary of B, deceased, the insured, in the beneficiary certificate issued by the defendant upon the life of the said B, and that on, to wit, the day of, at, to wit, the county of and state of, the plaintiff, A, killed and murdered the insured, B, by reason of which the said plaintiff then and there forfeited and lost all rights as a beneficiary under the beneficiary certificate described in said plaintiff's declaration. (Pray judgment)

Replication

That the said A, the son and beneficiary of B, deceased, did not murder the said B on the day of, 19.., but avers that the said A did kill the said B on that day while he, the said A, was insane.

1183 Occupation different, plea (Ill.)

That the alleged bodily injuries from which the said J died were received while he, said J, was engaged in an occupation or exposure classed by the defendant at the date of the policy of insurance set forth in said count of said declaration higher than the premium paid for the said policy of insurance, to wit, the occupation of a weaver, which occupation was, at the date of said policy, classed by this defendant as ordinary, and the annual premium for which was, to wit, dollars per thousand dollars of insurance. (Pray judgment)

Replication

That the bodily injuries from which the said died, as set forth in the (first, second, etc.) counts of the plaintiff's declaration were not received while the said was engaged in the occupation of a weaver or in an occupation or exposure classed by the defendant at the date of the policy of insurance set forth in said (first, second, etc.) counts of the plaintiff's declaration higher than the premium paid for the policy of insurance, as the defendant has above in its said plea alleged. (Conclude to the country)

1184 Suicide

No recovery can be had under a life insurance policy which invalidates the instrument upon the insured's dying by his own hand, whether sane or insane, and the action is for insurance upon the person thus insured and dying. In such a case the degree of insanity is unimportant.²¹⁵

1185 Suicide, plea (Ill.)

That the alleged bodily injuries from which the said J died were intentionally inflicted upon himself in violation of the terms of the said policy of insurance as set forth in the count of said declaration. (Pray judgment)

Replication

That the bodily injuries from which the said died, as set forth in the (first, second, etc.) counts of said declaration, were not intentionally inflicted upon himself in violation of the terms of said policy of insurance, as the defendant has above in its said plea alleged. (Conclude to the country)

1186 Ultra vires, plea (Ill.)

That it is, and was on and prior to the day of, 19.., a fraternal beneficiary order or society incorporated by and under the laws of the state of, and was on and prior to said date doing business as such fraternal beneficiary order and society; that it had at all times since its said incorporation and has now a lodge system with ritualistic form of work and representative form of government, and is an association formed, organized and carried on for the sole benefit of its members and their beneficiaries and not for profit.

²¹⁵ Seitzinger v. Modern Woodmen, 204 Ill. 58, 68 (1903).

Said defendant further alleges that on, to wit, the day of, 19.., at, to wit, the county of, and state of, E, who is described in plaintiff's declaration as the father of the plaintiffs, made and delivered to defendant a partly printed and partly written application signed by himself, in which application said E applied for membership in Home Tribunal No. of the defendant order and for benefits therein to the amount of \$..... in class A. That defendant, at the time said application was made to it as aforesaid, to wit, on the day of, 19.., was a fraternal beneficiary organization or society incorporated by the state of, and doing business as such, and then and there had authority to receive applicants as members and to insure them and their lives by granting to them beneficiary certificates. That Home Tribunal No. was a local lodge or tribunal of the defendant Supreme Tribunal and as such local tribunal received the said application of the said E, and thereupon caused the said E to be examined by the medical examiner of said Home Tribunal, which it was its duty to do. A copy of said application made by said E is attached to defendant's pleas marked exhibit "A," and made a part of this plea.

Defendant alleges that said E in his said application among other things stated that he was born on the day of, in the year 19.., and that he was years old at his nearest birthday and that he warranted the truthfulness of the statements in his said application and consented and agreed that any untrue or fraudulent statement made therein should forfeit all the rights of himself and his family or dependents in all benefits and privileges of said membership; reference to said application marked exhibit "A," being hereby made for greater certainty as to the statements made by said E in his said application to said Home Tribunal as aforesaid.

Defendant further alleges that said Home Tribunal received said E into membership in said Home Tribunal and forwarded his said application to the defendant Supreme Tribunal as it was its duty to do; and said Supreme Tribunal thereupon, having full faith and confidence in the truth of the statements made by said E in his said application as to his age, issued and caused to be delivered to him a beneficiary certificate in the defendant order for the sum of \$....., which certificate was afterwards surrendered by said E to defendant and the beneficiary certificate sued on in this case issued and delivered to said E in the place and stead thereof by agreement between the said E and the defendant.

Defendant alleges that said E, when he made said application, to wit, on the said day of, 19.., was in truth and in fact more than years of age at his nearest birthday, and that his statement in his said application as to his age and date of his birth was false and untrue.

By reason of which false and untrue statement of the date of his birth and age the said E forfeited all rights of himself and his family in said last named beneficiary certificate, as well as in said first beneficiary certificate. Defendant further alleges that said E well knew when he made said statement in his said application that he was not born on the day of, 19.., and that his age was not years at his nearest birthday, and that said statement was false and untrue; and defendant further alleges that said E made said false statement for the purpose of defrauding and deceiving this defendant by causing it to issue to him the beneficiary certificate sued on in this case. And defendant further alleges that it had no knowledge that said E was more than years old when he made said application until since the death of the said E.

Defendant therefore avers that said beneficiary certificate sued on in this case is void and not binding on this defendant. (Pray judgment) ²¹⁶

1187 Loss of goods, express company; validity of statute

Clause 10, section 1294c of the Virginia statutes regulating common carriers is not in conflict with the Federal laws concerning commerce.²¹⁷

1188 Non-performance, plea (Md.)

And for their plea, the defendants say that the plaintiff has not fulfilled all the terms of the agreement between the plaintiff and the defendants on his part to be fulfilled, and has not always held himself ready and willing to perform all of the terms of the agreement aforesaid, and that the defendants have not wrongfully refused and still refuse to pay to the plaintiff the sums due him by reason of the agreement afore mentioned.

PROMISSORY NOTES

1189 Accommodation maker, plea (Ill.)

That said note in said count of said declaration specified and said to have been given by said defendant to said plaintiff, was made and entered into without a good or valuable consideration, and that the same is entirely without consideration; and said defendant shows to the court that said note was given by said defendant to said plaintiff as an accommodation

²¹⁶ Steele v. Fraternal Tribunes,
²¹⁵ Ill. 190 (1905).

lottesville Woolen Mills, 109 Va. 1,
4 (1908).

²¹⁷ Adams Express Co. v. Char-

to said plaintiff and for the use of said plaintiff, and that said defendant derived no benefit or advantage from the making of said note whatever, and the same was made purely and entirely for the accommodation of said plaintiff. Wherefore said defendant says that said note was given entirely without consideration. (Pray judgment) ²¹⁸

1190 Assignment, practice

In order to put in issue, in Illinois, the assignment of a promissory note under the general issue, it is necessary to make and file with the plea an affidavit stating, specifically, that the payee did not assign the note, or that the signature to the assignment is not his. ²¹⁹

1191 Consideration, want or failure, generally

At common law failure of consideration could not be pleaded in an action upon a promissory note. ²²⁰ In Illinois the rule has been changed by statute in actions upon notes, bonds, bills or other written instruments, allowing the pleading of three distinct defenses; want of consideration, total failure of consideration, and partial failure of consideration, requiring each defense to be specifically and separately pleaded or notice given under the general issue, and proved. ²²¹

So, since the adoption of Circuit Court Rule 7c in Michigan, the facts upon which the defense of failure or want of consideration of a written instrument or of a promissory note which constitutes the basis of the action, must be plainly set forth in a notice added to the plea. ²²²

A defendant may show the want of consideration for the giving of the note without specially pleading that defense when the plaintiff introduces the note under the common counts. ²²³

The defense of failure of consideration is not available in an action upon a promissory note brought by an assignee, unless

²¹⁸ Peabody v. Munson, 211 Ill. 324 (1904).

²¹⁹ Templeton v. Hayward, 65 Ill. 178, 179 (1872).

²²⁰ Wadhams v. Swan, 109 Ill. 46, 61 (1884).

²²¹ Wadhams v. Swan, *supra*; Sec. 9, c. 98, Hurd's Stat. 1909; Rose v. Mortimer, 17 Ill. 475 (1856); Mitchell v. Deeds, 49 Ill. 416, 420 (1867).

²²² Walbridge v. Tuller, 125 Mich.

218, 220 (1900); Fifth Avenue Library Society v. Hastie, 155 Mich. 56, 59 (1908); (10074), C. L. 1897 (Mich.); Circuit Court Rule 7 c; Perkins v. Brown, 115 Mich. 41, 43 (1897), obviated by court rule; Keystone Mfg. Co. v. Forsyth, 126 Mich. 98, 100 (1891-1901), obviated by court rule.

²²³ Clarke v. Newton, 235 Ill. 530, 533 (1908).

the assignment was made after maturity, or the assignee had notice of the defense at the time of the assignment.²²⁴

1192 Consideration, failure; plea, requisites

A plea of failure of consideration must set forth what the consideration was,²²⁵ and it must be specifically averred wherein the consideration has failed.²²⁶

1193 Consideration, partial failure; plea, requisites

A plea of part failure of consideration must set forth in what the failure consists and the extent thereof.²²⁷

1194 Consideration, total failure; plea, requisites

A plea of total failure of consideration must set forth in what manner the consideration has failed.²²⁸ A defendant will not be permitted to show a partial failure under a plea of a total failure of consideration.²²⁹

1195 Diligence, failure to use; demurrer (Ill.)

And the said defendant C by, his attorney, comes and defends, when, etc., and says that the count of the said declaration, and the matters therein contained in manner and form, etc., are not sufficient in law for the plaintiff to maintain his aforesaid count, and that he, the defendant, is not bound by law to answer the same, and he shows to the court here the following special causes of demurrer to the said count, that is to say, the same on its face shows that the plaintiff did not use due diligence by the institution and prosecution of a suit against the said P, maker of said note, for the recovery of the money or property due thereon or damages in lieu thereof. For that said note was past due upon and by the day of, 19.., and sundry and divers terms of the court of the court of said county, and the court of said county, and of the court of said county thereafter commenced and were held, and had prior to the one at which said suit recited in

²²⁴ Harlow v. Boswell, 15 Ill. 56 (1853).

²²⁵ Vanlandingham v. Ryan, 17 Ill. 25, 28 (1855).

²²⁶ Wisdom v. Becker, 52 Ill. 342, 345 (1869).

²²⁷ Sims v. Klein, Breese, 302 (1829); Sec. 9, c. 98, Hurd's Stat. 1909.

²²⁸ Sims v. Klein, Breese, 302; Parks v. Holmes, 22 Ill. 522, 524 (1859); Sec. 9, c. 98, Hurd's Stat. 1909.

²²⁹ Wadhams v. Swan, 109 Ill. 61.

said count was instituted, and to which said plaintiff could have brought suit upon said note against said P, but failed so to do; and said count fails to show or to allege that such suit, if so brought, would have been unavailing; and also that such count is in other respects uncertain, informal, and insufficient.

Affidavit of merits

(Venue)

C, being first duly sworn, on oath says that he is the defendant in the above entitled cause; that he makes special his affidavit of merits on file herein; that the plaintiff wholly failed and neglected to institute suit with due diligence against the maker of the notes in question; and that he denies that the said maker at the maturity of the said notes or note in question was insolvent and unable to pay the said note or notes in question or any part thereof, as in the declaration is alleged.

.....

Subscribed, etc.

1196 Notice of defense

A general allegation of an assignee's notice of existing defenses against a promissory note, is insufficient. The averment of notice must be specific and must show that the assignee had notice at or before the time the note was assigned to him.²³⁰

1197 Ownership, proof

A plea of general issue in an action of assumpsit upon a promissory note entitles the defendant to show that the plaintiff did not own the note at the time he commenced the action.²³¹

1198 Surrender to maker, pleading

The surrender to the maker of an unpaid promissory note "stamped paid" to enable him to present it to a surety for the purpose of obtaining a surrender of collateral securities, must be specially pleaded.²³²

1199 Recoupment

In an action for rent, the defendant may recoup any damages which he might have sustained as a result of the landlord's

²³⁰ Bemis v. Homer, 145 Ill. 567, 571 (1893).

²³¹ Reynolds v. Kent, 38 Mich. 246, 247 (1878).

²³² Commercial Loan & Trust Co. v. Mellers, 237 Ill. 119, 121 (1908).

wrongful act or omission whereby the beneficial enjoyment of the premises was diminished.²³³

1200 Redemption, failure; plea, requisites

In an action of assumpsit for the value of property that has been taken under a contract of bailment and converted, a plea which relies upon the failure to redeem must allege the giving of notice to the bailor of the time and place of the sale and the taking place of the sale at public auction; unless the contract of bailment authorizes a private sale and without notice.²³⁴

1201 Res judicata, replication (Ill.)

That prior to the commencement of this suit the said plaintiff herein commenced an action of assumpsit against the said defendant C, in the court of county, and procured service of process upon the defendant in said cause in which said action said plaintiff filed his declaration and bill of particulars declaring and counting upon the identical and same cause of action and claim in said additional counts and each of them set forth, and to which said declaration said C, defendant herein, appeared and pleaded the plea of general issue thereto; that thereafter issue being joined in said action, trial was had by the court upon the said claim of said plaintiff against the said defendant, and in and about which said trial of said cause the said defendant was fully and completely advised and apprized of said plaintiff's claim and cause of action so sued upon, and in which action after a hearing by the court, said plaintiff upon his motion submitted to a nonsuit for want of sufficient evidence, and then and there notified said defendant that another action would be brought against said C for the same claim, of which said defendant had due notice; and plaintiff avers that immediately thereafter, to wit, on the day of, said plaintiff commenced the above entitled action in the circuit court of county against said defendant C, and filed in the same his declaration upon the identical claim so prosecuted against him in the court; and plaintiff further avers that said defendant C at the time of the commencement of this suit, and since then and now has knowledge or notice of the fact that this action, to wit, the above entitled action, was brought upon the same and identical claim set forth and insisted upon in said action commenced and prosecuted in said court above set forth, and that the said claim in said additional counts, and each of them mentioned, filed herein by leave of court, con-

²³³ Rubens v. Hill, 213 Ill. 523, 541 (1905).

²³⁴ Cushman v. Hayes, 46 Ill. 145, 153, 154 (1867).

stitutes the claim for which said plaintiff intended to bring the above entitled action, and not otherwise, and of this said defendant C had notice, to wit, at the county aforesaid; and this he is ready to verify, wherefore, etc.

1202 Set-off, advance money

In an action of assumpsit upon a contract for the sale of land, the defendant may claim the advance money as a set-off, where he has rescinded the contract for the vendor's failure to perform it.²³⁵

1203 Set-off, general plea (Fla.)

That the said, the plaintiff's testator, was in his life time and at the time of his death indebted to the defendant in an amount equal to plaintiff's claim, for money payable by the said to the defendant for work done by the defendant for the said at his request; and for money received by the said for the use of the defendant; which amount defendant is willing to set off against the plaintiff's claim.

(Illinois)

That the plaintiff.. w.... before and at the time of the commencement of this suit and still, indebted to ..h...., the defendant.., in the sum of dollars for divers goods, wares and merchandise by said defendant.. before that time sold and delivered to said plaintiff.., at the special instance and request of said plaintiff..; and in the like sum of dollars for money before that time lent and advanced by said defendant.. to said plaintiff.., at the request of said plaintiff..; and in the like sum for money by said defendant.. before that time paid, laid out and expended for the plaintiff.., at the request of said plaintiff..; and in the like sum for other money by said plaintiff.. before that time had and received to, and for the use of said defendant..; and in the like sum for other money before that time then due and owing to the defendant.. for interest upon, and for the forbearance on divers other sums of money before that time due and owing from said plaintiff.. to said defendant..; and in a like sum upon an account stated between the said plaintiff.. and said defendant.., and agreed upon between them; and in a like sum for money before that time due and owing from said plaintiff.. to said defendant.., and being in arrear and unpaid, and upon which said defendant.. and plaintiff.. had an accounting and upon which ac-

²³⁵ Conway v. Case, 22 Ill. 127,
140 (1859).

counting said plaintiff.. then and there w.... found to be in arrears and indebted to the defendant..; and said plaintiff.. being so indebted in the sums above mentioned, and in the manner set forth, then and there promised to pay the said money to the said defendant.., but notwithstanding ..h.... said promises, said plaintiff.. ha.. refused, and still refuse.. so to do, which said sum and sums of money so due from the plaintiff.. to the defendant.., as aforesaid, exceed the damages sustained by the plaintiff.., by reason of the non-performance by the defendant.. of the several supposed promises in said declaration mentioned, out of which said sum of money said defendant.. ready and willing, and hereby offer.. to set off and allow the full amount of said damages; and this said defendant.. ready to verify, wherefore ..he.... pray.. judgment, etc.

Replication

That the said plaintiff.. w.... not nor indebted to the said defendant.. in manner and form as the said defendant.. ha.. above in ..h.... said last plea in that behalf alleged.

(Maryland) Plea

And the said, defendant in this action, by leave of the court first had and obtained, for a additional plea says:

That the plaintiffs are indebted to the defendant in an amount greater than the plaintiffs' claim, for money payable by the plaintiffs to the defendant.

1. For goods bargained and sold by the defendant to the plaintiffs.

2. For money lent by the defendant to the plaintiffs.

3. For money had and received by the plaintiffs for the use of the defendant.

4. And for money paid by the defendant for the plaintiffs at their request—a statement of which said claims is hereto attached—which said amount the defendant is willing to set off against the plaintiffs' alleged claims.

1204 Set-off, special plea (Ill.)

That at and prior to the time of bringing suit herein, the said plaintiffs were indebted to these defendants in the sum of dollars under and by virtue of a certain agreement or contract entered into between the plaintiffs and these defendants on or about the day of, 19.., whereby the plaintiffs for a certain consideration named, agreed to furnish all material and do all labor in the construction of the concrete work at the building of the defendants on the corner of and

streets, in the city of, in accordance with certain specifications then and there agreed upon, and under and by which said specifications said plaintiffs were to furnish and set pieces of feet each, of prismatic cement vault lights, steel trap doors and springs, by each, which said doors were to be of the best quality; also one inch star solid coal hole cover and thimble; also all steel "I" beams necessary for such construction, all beams to be placed on the street side of said building, to be inch beams of lbs. weight per foot, and on the street side of said building said plaintiffs were to use in said construction steel "I" beams weighing lbs. per foot; said steel "I" beams were to extend from the curb wall to the building wall, supported by piers of the same size and quality of the beams, and said steel beams for said sidewalk on both the and street side of said building were to be set four and one-half feet apart, and the concrete work was to cover the entire basement area of said building, also the entire sidewalk space from the east line of said building at street around to the south line of said building on street, and was to run from the wall of said building out and down to the curb stone at said line and form a complete concrete sidewalk around said building; and the said plaintiffs were also to use in the construction of said concrete sidewalk and concrete basement the best quality of clean, sharp torpedo sand, the best quality of imported German Portland cement and first class crushed limestone, the said concrete work in said basement to be four inches in thickness, laid in timber forms, and to be in all strictly first class and pitched and drained as directed; and the said plaintiffs in said contract agreed to construct said sidewalk in arch shape between the said steel "I" beams, the same to be and inches thick at the edge of the "I" beams and inches thick at the crown of the arch, all to be constructed in a first class manner and in accordance with the city ordinances; and the said plaintiffs then and there in said contract agreed and guaranteed said work to be strictly first class in all particulars, and guaranteed the same not to crack, scale or break for a period of ten years, and to be completed in all respects to the satisfaction of these said defendants.

And the defendants aver that the plaintiffs did not nor would, although often requested so to do, furnish to these said defendants a concrete sidewalk and basement in accordance with said agreement and specifications; that the steel "I" beams and iron work necessary in the construction of said concrete sidewalk and basement were not in accordance with the said specifications; that the said steel "I" beams were not of the desig-

nated size, but of a much smaller size and much lighter weight; that said concrete sidewalk was not pitched in accordance with the city ordinances, and that said concrete basement was not pitched and drained in accordance with the directions of these defendants given then and there to the said plaintiffs; that the concrete used in the construction of said sidewalk and said basement was not composed of clean, sharp torpedo sand, nor of the best quality of imported German Portland cement and clean crushed limestone, but was composed of an inferior quality of torpedo sand and a cheap and worthless grade of cement; and said concrete in said basement is not four inches in thickness as specified in said agreement; nor is said concrete sidewalk and inches thick at the edge of the "I" beams, but is about inches thick at the edge of the "I" beams; nor was said sidewalk so constructed as to be inches thick at the crown of the arch as specified in said agreement, but is in many places less than inches thick at the crown of the arch; nor was said concrete mixed in accordance with said specifications; and said sidewalk and basement have cracked, scaled and broken and are not a first class job in all particulars; and said work was not completed by the said plaintiffs in all details to the entire satisfaction of these said defendants as provided in said agreement.

Wherefore the defendants aver that on account of said defective material used in the construction of said concrete sidewalk and basement, and on account of the defective construction of said sidewalk and basement, the same have cracked, scaled and broken in many places and are crumbling and falling to pieces and are filled with holes and crevices, and the said work so finished and completed by the plaintiffs as aforesaid is practically worthless and within a few years will have to be removed and taken entirely out, to the great damage of these defendants, and will necessitate these said defendants expending the sum of \$. to complete said work in accordance with said contract, and the default of the said plaintiffs in this regard as aforesaid has put these said defendants to great expense and inconvenience in carrying on the business of these said defendants to facilitate which said concrete sidewalk and basement were desired by these defendants, as the plaintiffs well knew; whereby these said defendants have sustained damages to the amount of \$., which said sum of money so due from the plaintiffs to these defendants as aforesaid exceeds the damages, if any, sustained by the plaintiffs by reason of the non-performance by the defendants of the several supposed promises in said declaration mentioned, and out of which said sum of money the defendants are ready and willing and hereby offer to set off and allow to the plaintiffs the full amount of said damages. (Pray judgment)

(Maryland)

That the plaintiff,, is indebted to the defendants in an amount equal to or greater than the plaintiff claims, for that the plaintiff and the defendants, on the day of, in the year 19.., entered into a written agreement, signed and sealed by the said plaintiff and said defendants, under which the said plaintiff bound himself to erect for the said defendants in county a certain church building to be known as, exclusive of all masonry work, within months from the said day of, 19.., according to the plans and specifications set forth in or made a part of said agreement, and that the defendants duly performed all the conditions thereof on their part, but that the plaintiff did not comply with his part of said agreement, in that he did not complete the said church within the time specified, and in that he did not complete said church according to the plans and specifications, and in that he used improper materials and his work was so defective that the roof sagged and leaked, and the church has been badly damaged by reason thereof, whereby the defendants were greatly damaged and claim therefor the sum of \$....., which amount the defendants are willing to set off against the plaintiff's claim.

As in duty, etc.

(Virginia)

The said defendant by his attorney comes and says: That before and at the time of the commencement of this action and of the filing of this plea the said plaintiff was and still is indebted to the said defendant in a large sum of money, to wit, the sum of dollars, which said amount is justly due to the said defendant by the said plaintiff and which amount is made up of the following items, to wit: (Itemize and explain each transaction, if more than one).

And the said defendant avers that the said sum of money, so due and owing to the said defendant from the plaintiff is in arrear and unpaid; and he, the said defendant, is ready and willing and hereby offers, according to the form of the statute for such cases made and provided, to set off and allow same against the sum of money asserted and claimed in a certain warrant in this action mentioned.

And this the said defendant is ready to verify, etc.

1205 Special assessment

In an action of assumpsit for the collection of a special assessment no irregularities or informalities can be urged in its defense.²³⁶

²³⁶ (3221), C. L. 1897 (Mich.).

1206 Statute of frauds, plea (Ill.)

That each and every one of the several supposed promises in the said declaration mentioned was a special promise to answer for the debt of another person, to wit, the said F, and that none of said supposed promises was or is in writing, or was or is signed by the defendants, or either of them, or by any other person or persons thereunto by them, or either of them, lawfully authorized, and that no memorandum or note of any of said supposed promises was or is in writing, or was or is signed by the defendants, or either of them, or by any other person or persons thereunto by them, or either of them, lawfully authorized, according to the form of the statute in such case made and provided. (Pray judgment)

1207 Statute of limitations, plea, requisites

A plea which sets up the statute of limitations should not contain an allegation that the supposed causes of action contained in certain counts were separate and distinct causes of action from those alleged in other counts, because such a statement is a conclusion of the pleader and is of no binding force.²³⁷

1208 Statute of limitations; plea (Ill.)

That the several supposed causes of action in said common counts of said declaration mentioned, did not, nor did any or either of them, accrue to the plaintiff or to said during his life time, at any time during the five years next preceding the commencement of this suit, in manner and form as the plaintiff has above complained against them, the defendants. (Pray judgment)

Replication

That the said several causes of action set forth in the common counts part and parcel of said declaration, and each and every of them did accrue to him and to the said during his lifetime within five years next before the commencement of this suit, in manner and form as he has above complained against the defendants.

Plea b

That the supposed cause of action in plaintiff.. declaration mentioned, did not accrue to the plaintiff.. at any time within ten years next before the commencement of this suit in manner and form as plaintiff.. ha.. above alleged. (Pray judgment)

²³⁷ Fish v. Farwell, 160 Ill. 236,
243 (1896).

Replication

That the said cause of action did accrue to it within ten years next before the commencement of this suit in manner and form as it, the plaintiff, has above complained against the defendant.

b

That the said promises of the defendant, in said declaration referred to, were in writing, and that the said several causes of action, and each of them, did accrue to them within ten years next before the commencement of this suit, in manner and form as they have complained against the defendant. (Pray judgment)

Rejoinder

That the said alleged promises of the defendant, in said declaration referred to, if such promises were in fact made, were not in writing; and of this the defendant puts itself upon the country, etc.

(Virginia) Plea

That the said several supposed causes of action in said declaration mentioned, if any such there were, or still are, did not nor did any or either of them accrue to the said plaintiff at any time within years next before the commencement of this suit in the manner and form of this suit, in the manner and form as the said plaintiff hath in his declaration complained against it, the said defendant. (Pray judgment)

1209 Subscription to shares of capital stock, fraud and circumvention; plea (Ill.)

That the contract of subscription in the plaintiff's declaration set forth was obtained to be made and executed by defendant to the plaintiff because of the false, fraudulent and deceitful statements and representations of the plaintiff on its own behalf and motion and by its president, secretary, treasurer, officers, managers, directors, canvassers and agents made to the defendant before and at the time the said alleged contract was made and executed as aforesaid in this, that said contract of subscription was made and executed by defendant to plaintiff upon the statement and representation of the plaintiff, its president, secretary, treasurer, officers, managers, trustees, canvassers and agents then and there made, that the capital stock of the plaintiff had not before that time been fully subscribed and taken, and that it was then ready, able and willing to deliver said capital stock to this defendant, as in the said contract of subscription set forth, which said statement was wholly false, as

the plaintiff well knew at the time it was made. Yet the defendant then and there fully relying on said statement and representation made by and on behalf of the plaintiff, entered into the aforesaid contract, said plaintiff well knowing that its capital stock had before that time been wholly subscribed and allotted, and that none of its capital stock could be delivered by it on its contract with defendant. (Pray judgment)

Replication

That the said contract of subscription was not obtained to be made and executed by the defendant, by the fraud or circumvention of the plaintiff and its officers, etc., and in manner and form as the said defendant,, has above in that plea alleged, but that the same was obtained fairly.

1210 Tender of admitted part, plea (III.)

And as to the said sum of dollars, parcel of the said several sums of money in the said declaration mentioned, the defendant says that the plaintiff ought not to have his aforesaid action against him, the defendant, to recover any greater damages than that sum of money, because he says that after the making of the said several promises in the said declaration mentioned, as to the said sum of dollars, parcel, etc., and before the commencement of this suit, to wit, on the day of, 19.., he, the defendant, was ready and willing and then and there tendered and offered to pay to the plaintiff the said sum of dollars, to receive which of the defendant the plaintiff then and there wholly refused; and the defendant further avers that since the making of the said several promises as to the said sum of dollars, he has been and still is there ready to pay to the plaintiff the said sum of money; and the defendant now brings the same into the court here, ready to be paid to the plaintiff, if he shall accept the same; and this the defendant is ready to verify; wherefore, he prays judgment if the plaintiff ought to have his aforesaid action to recover any greater sum than the said sum of dollars, parcel of the said several sums of money, etc.

Replication

And as to the plea of the defendant by him above pleaded as to the said sum of dollars, parcel, etc., and numbered plea, the plaintiff says that he ought not, by reason of anything in that plea alleged, to be barred from having his aforesaid action to recover further damages than that sum of money, because he says that the defendant did not tender or offer to pay to the plaintiff, the said sum of

dollars, parcel, etc., in manner and form as the defendant has above in that plea alleged; and this the plaintiff prays may be inquired of by the country, etc.

1211 Tender under compromise, plea

The plaintiff ought not to have or maintain his aforesaid action thereof against him, the said defendant, to recover any more or greater damages in this behalf than the sum of, because he says that the defendant, on, etc., at, etc., was indebted to the plaintiff by virtue of the said several promises and undertakings in the said declaration mentioned, in the sum of, and no more, and that he, the said defendant, afterwards and before the commencement of this suit, to wit, on, etc., at, etc., was also indebted to divers other persons, to wit, etc., etc., in certain other large sums of money respectively, and the defendant being so indebted as aforesaid, the defendant was then and there unable to pay them, his said creditors, the full amount of the said several debts, whereof the said plaintiff and the said several other creditors of the said defendant then and there had notice; and it was then and there computed and agreed, upon an investigation then and there had, by, between, and amongst the plaintiff and the said several other creditors of the defendant, that the estate and effects of the said defendant would not extend to pay dollars on the amount of the debts due and owing by the said defendant, of which the plaintiff and the said several other creditors also then and there had notice: whereupon, it was then and there proposed and agreed, by, between, and amongst the plaintiff and the said several other creditors of the defendant, and also by, by the procurement of the defendant, and at the request of the plaintiff, that the said should and would pay out of his own proper moneys to the plaintiff and the several other creditors of the defendant, a sum of money equivalent to dollars on the amount of their respective debts, in full satisfaction and discharge thereof; which said sum of money they, the plaintiff, and the said several other persons, creditors of the defendant, should and would severally accept and receive in full satisfaction and discharge of their said respective debts; and the said agreement being so made as aforesaid, to wit, on, etc., at, etc., in consideration that the said defendant, and also the said by the procurement of the defendant, and at the request of the plaintiff, had then and there undertaken and faithfully promised the plaintiff to perform and fulfil all things in the agreement contained on their respective parts to be performed and fulfilled, the plaintiff and the said several other creditors of the defendant undertook and then and there faithfully promised the defendant to perform and fulfil all things in the said agreement contained on their parts and behalfs to

be performed and fulfilled; and the defendant avers that in consideration and in pursuance of the said agreements afterwards and before the commencement of this suit, to wit, on, etc., at, etc., the said tendered and offered to pay, out of his own proper moneys, for and on behalf of the defendant, to the plaintiff, the sum of dollars, being so much as amounted to dollars upon the said sum of dollars, the said amount of the said debt, so as aforesaid due and owing from the defendant to the plaintiff and which said sum of money so tendered and offered to be paid as last aforesaid, the plaintiff then and there refused to accept. And the defendant further says, that the said, from the time of making of the said agreement, always hitherto hath and still is ready to pay the said sum of money to the plaintiff, to wit, at, etc.; and the said sum of dollars, so tendered as aforesaid, is now brought into court here, ready to be paid to the plaintiff, if he will receive the same; and this the defendant is ready to verify: wherefore he prays judgment if the plaintiff ought to have or maintain his aforesaid action thereof to recover any more or greater damages than dollars in this behalf against the defendant.²³⁸

1212 Trust and monopoly, plea (III.)

That the said cause of action in said declaration mentioned, and all the causes of action therein set forth, originated in the following manner and none other, that is to say, that the said plaintiff, being a corporation, had before the making of the alleged promises by the said defendants set forth in said declaration, created, entered into and was at said time, a combination existing for the purpose of regulating, fixing and establishing the price of milk to be sold within the corporate limits of the city of by producers, shippers and wholesale dealers to the city dealers and retail dealers within said city, and for the purpose of fixing and limiting the amount and quantity of milk to be supplied and sold within the corporate limits of the city of by producers, shippers and wholesale dealers to the city dealers and retail dealers within said city; that pursuant to the purpose of such combination, and before the making of the alleged promises and undertakings of the said defendants, set forth in said plaintiff's declaration, said plaintiff became a party to an agreement and combination, confederation and understanding, with divers persons, to wit: in number, who were then and there stockholders in the said corporation and who were then and there producers of milk living and being in the vicinity of said city of,

²³⁸ *Anstey v. Marden*, 1 Bos. & Pul. N. R. 124 (1804).

and with divers and sundry other persons, to regulate, fix and establish the price at which milk should thenceforth be supplied and sold within the corporate limits of the city of by the said plaintiff and the persons so named as aforesaid, to the city dealers and the retail dealers of milk in said city; and the said plaintiff, before the making of the alleged promises and undertakings set forth in said plaintiff's declaration, had also entered and become a party to an agreement, contract, combination and confederation to fix and limit the amount and quantity of milk to be supplied and sold within the corporate limits of said city; that pursuant to the said unlawful agreement and combination, the said plaintiff afterwards caused the said defendant,, who was then and there a retail dealer in milk in said city of to enter into the said unlawful combination by executing and delivering to said plaintiff (jointly with his said co-defendant), the contract or agreement in writing, set forth in said plaintiff's declaration, and after the execution thereof, the said plaintiff delivered to the said defendant, certain large quantities of milk to be by said defendant again sold and retailed to the customers of said defendant in said city of, and for which the said defendant, had in said undertaking and writing, then and there agreed and promised to pay the said plaintiff the price as fixed and determined by said plaintiff, and the said combination hereinbefore referred to, contrary to the law in such case made and provided; and the said plaintiff avers that the said goods and merchandise by the said plaintiff alleged in said declaration to have been sold and delivered to the said defendant, were none other and different than the said milk so delivered as above set forth, and that the said agreement and undertaking of the defendants set forth in said declaration, were none other and different than the agreement and undertakings of the defendants to pay the said plaintiff the said unlawful price for the said milk as above set forth. (Pray judgment)

Replication

That the said several causes of action, and each and every of them originated in manner and form as it has above complained against the defendant, and that it, said plaintiff, is not nor was a corporation organized and created for the purpose of regulating, fixing and establishing the price of milk to be sold within the corporate limits of the city of by producers, shippers and wholesale dealers to the city dealers and retail dealers, nor for the purpose of fixing and limiting the amount and quantity of milk to be supplied and sold within the corporate limits of the city of by producers, shippers and wholesale dealers to the city dealers and retail dealers; that it did not before the making of the promises and undertakings of said defendants, set forth in its, said plaintiff's declara-

tion, enter into and become a party to an agreement, combination, confederation and understanding with and divers and sundry other persons, or any persons whatever, to regulate, fix and establish the price at which milk should thenceforth be supplied and sold within the corporate limits of the city of by itself and said persons, so named as aforesaid, or any persons whatever, to the city dealers and retail dealers of milk in said city; that it had not, before the making of the promises and undertakings set forth in its, said plaintiff's declaration, or at any time, entered into and become a party to an agreement, contract, combination and confederation to fix and limit the amount and quantity of milk to be supplied and sold within the corporate limits of the city of; that the said several causes of action, and each and every of them did not accrue to it, said plaintiff, pursuant to an unlawful agreement, combination, confederation, and understanding whatever, but did accrue to it, said plaintiff, in manner and form as it has above complained against these defendants.

GENERAL ISSUE

1213 Nature and scope, generally

In *assumpsit* the general issue, in effect, denies the existence of every material fact, or state of facts, which constitutes the plaintiff's cause of action declared upon.²³⁹ Under this issue, the defendant, at common law may avail himself of any matter which shows that the contract is illegal, by reason of infancy, lunacy, coverture at the time the contract was entered into, gaming and usury.²⁴⁰ The defendant may also show that the contract set up by the plaintiff is not the contract that was actually entered into;²⁴¹ or he may urge anything which goes to show that the plaintiff is not equitably entitled to the amount of his claim, except when it arises from intricate and disputed accounts between various parties.²⁴²

Any matter which shows that the defendant was not indebted to the plaintiff at the time of the commencement of the action is admissible under the general issue. Thus the release or the discharge of a surety by a valid extension of time agreed to

²³⁹ *Wilson v. Wagar*, 26 Mich. 452, 455 (1873).

²⁴⁰ *Stockham v. Munson*, 28 Ill. 51, 53 (1862); *Snyder v. Willey*, 33 Mich. 483, 489 (1876); *Hill v. Callaghan*, 31 Mich. 424, 425 (1875); *Streeter v. Streeter*, 43 Ill.

155, 164 (1867); c. 68, Hurd's Stat. 1909, p. 1240.

²⁴¹ *Weaver v. Richards*, 156 Mich. 320, 323 (1909).

²⁴² *Leigh v. National Hollow Brake-Beam Co.*, 223 Ill. 407, 409 (1906).

between the principal debtor and the creditor, without the surety's assent may be shown under the general issue.²⁴³

1214 Delivery

Formerly, in Michigan, a plea of the general issue admitted proof of the delivery of a different article from that which was purchased;²⁴⁴ but now it is doubtful if this defense, or the defense of non-delivery, is provable under that issue.²⁴⁵

1215 Fraud

Fraud practiced in the procuring of the acceptance of a draft which is the subject of the suit, may be proved under the general issue in Maryland.²⁴⁶ It is doubtful if the defense of fraud is provable under the general issue in Michigan.²⁴⁷

1216 Nonjoinder of proper plaintiffs

The nonjoinder of proper plaintiffs may be shown under the plea of the general issue.²⁴⁸

1217 Partnership

By Illinois statutory provision a plea of the general issue in actions upon contracts, although verified, does not put the partnership of the plaintiff or the defendant in issue.²⁴⁹

1218 Payment

Payment was formerly admissible in Michigan under the general issue;²⁵⁰ but now this defense should be set up in a notice added to the plea.²⁵¹

1219 Performance

Noncompletion of a contract forming the basis of an action of assumpsit may be shown under the general issue.²⁵²

²⁴³ Harrison v. Thackaberry, 248 Ill. 512, 516 (1911).

²⁴⁴ Grieb v. Cole, 60 Mich. 397, 402 (1886).

²⁴⁵ Circuit Court Rule 7c.

²⁴⁶ Stouffer v. Alford, 114 Md. 110, 116 (1910).

²⁴⁷ Circuit Court Rule 7c.

²⁴⁸ Lasher v. Colton, 225 Ill. 234, 236 (1907).

²⁴⁹ Heintz v. Cahn, 29 Ill. 308, 311 (1862).

²⁵⁰ Olcott v. Hanson, 12 Mich. 452, 454 (1864); Brennan v. Tiet-sort, 49 Mich. 397, 398 (1882).

²⁵¹ Circuit Court Rule 7c.

²⁵² Brown v. Kriser, 129 Mich. 448, 450 (1902).

1220 Practice

The pleas of non assumpsit and *nul tiel corporation* are of the same general nature pleas in bar, and under Illinois practice, may be pleaded at the same time.²⁵³

FORMS

1221 District of Columbia

1. For a plea to the plaintiff's declaration, defendant says that it never promised as alleged.

2. And for a further plea to plaintiff's, etc. (Add special matter)

By executor

That the said did not, in his life time, undertake and promise in manner and form as is in said declaration alleged.

1222 Florida

....., defendant, says that he was never indebted as alleged.

1223 Illinois

And the said defendant,, by, h.... attorney,, come.. and defend.. the wrong and injury, when, etc., and say (as to the amended declaration) that he did not (neither did either of them) promise and undertake in manner and form as the plaintiff.. ha.... above thereof complained against ..h....; and of this ..he.... putsel..... upon the country, etc.

Admitting part of claim

(Commence and conclude as in Section 1223) That as to all the several supposed promises in the said declaration mentioned, except as to the sum of dollars, parcel of the several sums of money in the said declaration mentioned, says that he did not promise in manner and form as the plaintiffs have above complained against him, the defendant.

1224 Maryland

1. That the defendant never promised as alleged.

2. And for a second plea, the defendant says that he was not indebted as alleged.

²⁵³ Hoereth v. Franklin Mill Co.,
30 Ill. 151, 157 (1863); Sec. 46,
Practice act 1907 (Ill.).

1225 Mississippi

Comes the defendant,, and for a plea to the declaration filed against him in above styled cause says that he did not undertake and promise and is not indebted to the plaintiff as alleged in said declaration; and of this he places himself upon the country.

1226 Virginia

And the said defendant, by its attorney, comes and says, that it did not undertake and promise in manner and form as the said plaintiff hath above complained. And of this the said defendant puts itself upon the country.

1227 West Virginia

The defendant,, comes and defends the wrong and injury when, etc., and says that he did not promise in the manner and form as the plaintiff has above thereof complained against him; and of this he puts himself upon the country.
.....p. d.

NOTICE WITH GENERAL ISSUE AND GROUNDS OF DEFENSE

1228 Check, plaintiff not innocent holder, notice (Ill.)

The plaintiff.. herein will take notice that upon the trial of this cause the defendant.. will offer proof of the following facts as a part of defense under said general issue; that at the time of the drawing of said check in said declaration mentioned on C, bankers, the defendant.. w.... a general depositor.. in said bank, and had sufficient moneys therein to pay said check; that for convenience caused said check to be certified by said C, which was done by said bankers and then and there, on the day of, 19.., delivered said certified check to D, of in payment of accepted draft drawn upon for the sum of dollars, which draft was in the hands of said D for collection against this defendant.

This defendant.. further say.. that on the and days of there was what is known as a clearing-house association for banks in the city of through which various checks drawn upon various banks doing business in the city of, were cleared and paid; that the plaintiff.., A, was a member of said clearing house association, and as such for a sufficient consideration had contracted with said C, non-member.. of said clearing-house association, to act as their clearing house agents, and to pay all such checks as would be drawn against said C, by its depositors, among others, this defendant..; that in accor-

dance with this arrangement said D in due course of clearing-house business, on said day of, presented said check for payment at said clearing-house, and the said check was paid to said D in due course of clearing-house business by said C, on behalf of said B, and so stamped as paid; and this defendant.. in due course of business received from said D the accepted draft for which said check was delivered to it by this defendant...

That at no time did said check become the property of said plaintiff..; that when said check thereafter remained in the possession of said plaintiff.. it held it, not as holder or owner thereof, but as the custodian of said paid check for C; and this defendant.. says that at the time of the payment of said check by said plaintiff.. on behalf of said C, there was still sufficient money on deposit for the use of this defendant to pay for said check, and that as to the extent of the amount represented by said check, said plaintiff.. has the right to demand from said C the amount represented by said check; that said plaintiff.. is not an innocent holder of said check, but received and paid the same as the agents of C, and now hold.. the same as creditors of said C, without any liability accruing to it from this defendant... Wherefore, this defendant.. prays judgment on .. behalf, etc.

1229 Grounds of defense (Va.)

The said defendant by his attorney, at the request of the plaintiff, files this, his statement of grounds of his defense to this action.

1. The defendant is not liable in any amount whatever to the plaintiff.

2. The plaintiff proposed to build a in question within days from the day of and the purchase price of dollars was to be liquidated at the rate of per month beginning with the delivery of, and the plaintiff was to furnish all materials, and labor for the construction of the same, and was to submit before beginning work on said to the defendant, for his approval and acceptance, specifications and plans; all of which the plaintiff utterly and wholly failed to do.

And other grounds which may be assigned at the trial.

Dated, etc.

.....
By
his attorney.

INSURANCE

1230 Generally

In Michigan a special rule of court requires the defendant company to give notice of all misrepresentations or warranties not contained in the policy of insurance that it expects to urge in defense on the trial; and if no such notice is given, the defense is waived.²⁵⁴ A defendant insurance company must confine itself to the specific fraud that is alleged in its notice of special defense.²⁵⁵

1231 Cancellation and other defenses, notice (Mich.)

To the above named plaintiff, and tohis attorney:

You will please take notice that on the trial of the above entitled cause, the defendant will give in evidence, and insist in its defense, under the general issue above pleaded, the following facts and circumstances, tending to show and showing that the policy mentioned in plaintiff's declaration was canceled and null and void before the occurring of the fire and loss mentioned in said declaration, and for the following among other reasons:

1. Because said policy numbered of
, of, was ordered canceled, and was canceled, on or about the day of, 19..; that verbal notice of such cancellation was served upon said, plaintiff, of, by special agent, representing the defendant company, prior to the time above mentioned, and said verbal notice was confirmed by notice in writing sent to said by registered mail, and of the receipt of which said written notice this defendant, by its agents, hold the post office receipt of the said Said notice having been given pursuant to the provisions of the policy following: "This policy shall be canceled at any time, at the request of the insured; or by the company, by giving five days' notice of such cancellation. If this policy shall be canceled as hereinbefore provided, or become void, or cease, the premium having been actually paid, the unearned portion shall be returned, on surrender of this policy, or last renewal, this company retaining the customary short rates; except that when this policy is canceled by this company, by giving notice, it shall retain only the pro rata premium."

2. That said policy at the time of the fire was null and void, not only because it had been duly canceled, but because

²⁵⁴ Home Ins. Co. v. Curtis, 32 Mich. 402, 403 (1875); Hann v. National Union, 97 Mich. 513, 521 (1893); Baker v. Michigan Mutual

Pro. Assn., 118 Mich. 431, 432 (1898); Circuit Court Rule 7d.

²⁵⁵ Pangborn v. Continental Ins. Co., 62 Mich. 638, 640 (1886).

no consideration whatever, was ever received by the defendant company for it, and that the company never received any premium on account of the issuing of said policy.

3. That said policy was null and void because the same was fraudulently issued, and the issuing and delivering thereof was procured by means of fraud and deceit; that one, who had been agent for other insurance companies, and who had issued policies and collected premiums for such companies, and who had not remitted to his companies, procured himself to be appointed agent for this defendant, and also for the, of,, and then fraudulently and deceitfully conspiring with the agents of said former companies, canceled said first policies and rewrote the risk aforesaid in defendant company, without remitting any premium therefor to defendant company; and that as soon as the matter came to the knowledge of defendant company, by its agents at, said policy was canceled as set forth in the special notice above mentioned; and said had full notice of said cancelation, and considered and treated said policy as null and void, and took other insurance instead.

4. The defendant will also show under the general issue above pleaded, that the alleged proofs of loss were incomplete, as they do not show a detailed statement of the loss, nor does the same contain a certificate of the magistrate or notary public, and also that the amount of the loss is not truly stated therein.

5. The defendant will also show under the general issue above pleaded, that said property mentioned in said policy was fraudulently, grossly overinsured, and even had the policy not been canceled it would have been null and void.

Yours, etc.

.,
Attorneys for defendant,
.

1232 Cause of fire, notice (Mich.)

You will please take notice that on the trial of this cause, the said defendant will give in evidence under the general issue above pleaded and insist in its defense that if the property mentioned in the said plaintiff's declaration and for the recovery of which this suit is brought, was damaged or destroyed by fire and which said property it is alleged was insured against loss or damage by fire by the said defendant, that said fire was caused, started and set, either by the said defendant or at his instance or request, and that said property if it was damaged

or destroyed by fire, was damaged or destroyed for the reason that the plaintiff either set fire to it or caused the same to be set.

Dated, etc.

To,
Attorneys for plaintiff.

1233 Increased hazard, etc., notice (Mich.)

You will please to take notice that on the trial of this cause the said defendant will give in evidence and insist under the general issue above pleaded that at the time said property for which the plaintiff seeks to recover in this case and which it is alleged in the declaration of said plaintiff was insured by the said defendant, against loss or damage by fire at the time it was so destroyed, if it ever was so destroyed, said plaintiff was illegally engaged in the business of a retail liquor dealer contrary to the laws of the state of Michigan and contrary to the terms of the policy which it is alleged the plaintiff had upon said property at the time it was damaged and destroyed by fire, or upon a large portion of said property, whereby, said insurance policy upon which this suit is brought, if there ever was any such policy, had become and was absolutely null and void and of no force or effect whatsoever.

2. You will please take further notice that on the trial of this cause, the said defendant will give in evidence and insist under the general issue above pleaded, that a large portion of the property which the plaintiff seeks to recover for in this case, was distilled, brewed, fermented and malt liquors and wine and that said plaintiff was a retail liquor dealer under the laws of the United States and that the special tax under the laws of the United States upon the business of retail liquor dealers, becomes due and payable on the first day of July of each year and that said plaintiff failed and neglected to pay said special tax which became due and payable on the first day of, 19., and that therefore, being engaged in the business of a retail liquor dealer as aforesaid, said plaintiff was carrying on said business unlawfully, at the time said property was destroyed by fire as alleged in the declaration of said plaintiff in this cause, if it ever was so destroyed. By reason whereof, the hazard of insurance against loss or damage by fire upon said property was increased, contrary to a condition in said policy which provides, "Or if the hazard be increased by any means within the control or knowledge of the insured," and that said hazard was increased by means within the control or knowledge of the said plaintiff. Wherefore said policy became and was entirely null and void at the time said property was destroyed as alleged in the plaintiff's declaration in this cause, if it ever was so destroyed.

3. You will please to take further notice that on the trial of this cause, the said defendant will give in evidence and insist

in its defense under the general issue above pleaded, that if said defendant ever made and delivered to the said plaintiff the insurance policy mentioned and described in said plaintiff's declaration in this cause, the same was made and delivered by the said defendant upon the express condition therein set forth, that, "This entire policy shall become void if the hazard be increased by any means within the control or knowledge of the insured." That at the time said policy was issued and delivered by the said defendant to the said plaintiff, if any such policy was ever issued and delivered, as aforesaid, the said plaintiff was engaged in the business of a retail dealer of spirituous or intoxicating liquors and brewed malt and fermented liquors and was selling and disposing of said liquors by the drink and in quantities of three gallons or less or one dozen quart bottles or less at any one time, at the village of in said county. That all the property mentioned and described in the declaration in this cause and which is averred to have been insured by said insurance policy, was then situate in the building in which said retail liquor business was carried on by said plaintiff as aforesaid, and in the adjoining and connecting additions thereto, mentioned in said plaintiff's declaration in this cause, which said building and the adjoining additions thereto were then occupied by said plaintiff as a saloon in which said liquor business was carried on by him and as the dwelling house of said plaintiff. That on, to wit, the day of, 19.., the said plaintiff neglected, failed and refused to pay the annual tax upon said business of retail liquor dealer at the village of, aforesaid, and said annual tax upon said business of retail liquor dealer was not paid by the said plaintiff but was still unpaid at the time the said plaintiff alleges that said property was burned, consumed and destroyed by fire, to wit, on the day of 19...

By reason whereof, the hazard assumed and undertaken by said defendant when said insurance policy was issued and delivered, was increased by means within the control or knowledge of the said plaintiff and without the knowledge of the said defendant, and said insurance policy if any was ever issued by the said defendant to the said plaintiff, became and was void at the time said property in said policy of insurance mentioned, was burned, consumed and destroyed as averred in said plaintiff's declaration in this cause, to wit, on the day of, 19...

1234 General defenses (fire insurance) notice (Ill.)

The plaintiff in the above entitled cause will take notice, that the defendant, under the plea of the general issue, will rely on and prove the following matters of defense, namely:

1. That the plaintiff did not at the time of the beginning of this suit have any right, claim or demand of any kind or

description whatsoever against the defendant, except whatever right, claim or demand the plaintiff then had, if any, against the defendant under and by virtue of a certain policy of insurance issued by the defendant to the plaintiff, bearing date the day of, 19....

2. That the plaintiff did not have any interest in the property insured by the said policy, or any part thereof, at the time of the fire mentioned in the declaration in said cause.

3. That the due proportion of the loss or damage sustained by the assured, provided by said policy to be paid by the defendant did not and does not exceed the sum of dollars.

4. That the amount of loss or damage to the plaintiff by reason of such fire, estimated according to the actual cash value of the insured property at the time of the fire, did not exceed the sum of dollars, and that the amount it would then cost to repair or replace the same, deducting therefrom a suitable amount for deterioration from use or otherwise, did not exceed the sum of dollars.

5. That the said plaintiff, did not give notice in writing to defendant of the said loss, immediately after the said fire, and did not render to the defendant a particular account of said loss in writing precisely stating the time, origin and circumstances of the fire, the occupancy of the building insured, or containing the property insured, other insurance, if any, and the copies of all policies and the value and ownership of the property, or the amount of loss or damages, according to the terms, conditions and provisions of said policy.

6. The said plaintiff did not, according to the terms of said policy, place the property damaged by the said fire in the best possible order, and make an inventory thereof, naming the quantity and cost of each article; and no appraisalment was had or requested by the said plaintiff as required by said policy.

7. The said loss and damage to the plaintiff by the said fire was caused by the neglect of the said plaintiff to use all practicable means to save and preserve the insured property from damage at and after the said fire, and by the neglect and failure of the plaintiff to observe the laws and ordinances made to prevent accident by fire.

8. The said loss and damage to the plaintiff by the fire aforesaid, was caused and produced by the working of carpenters or other mechanics in the said building, altering or repairing the said premises without the permission of the defendant for the doing of such work being first endorsed in writing on the said policy.

9. That said policy of insurance was canceled and annulled by the defendant under the terms and provisions of said policy prior to said fire.

10. That the said plaintiff in his application for the said policy, made erroneous representations as to the said insured property, which were then untrue, and also omitted to make

known to the defendant facts within his knowledge material to said risk.

11. After the issue of the said policy the plaintiff obtained other insurance on the said insured property without the consent of this defendant endorsed on said policy.

12. Said risk was increased after the issue of said policy by means within the control of the said plaintiff.

13. The premium mentioned in said policy was never paid by the plaintiff, and the defendant never waived such payment.

14. Before said fire, the defendant demanded of plaintiff the return of said policy for cancelation, and offered to pay the return premium due, upon such cancelation, according to the terms of said policy: but said plaintiff refused to comply with such a demand.

15. After the issue of the said policy, and before the said fire, the title to the said insured property, and the possession thereof, were changed by legal process, judicial decree and voluntary transfer or conveyance; and at the time of said fire, said property was not owned by the plaintiff.

16. After the issue of the said policy and before the said fire, the title, interest, location and possession of said insured property was changed in divers ways other than succession by reason of the death of the assured.

17. The said policy was assigned by the plaintiff prior to the said fire without the consent of the defendant endorsed thereon.

18. At the time of the issue of said policy and also at the time of the said fire, the said plaintiff was not the entire and sole owner of the said insured property.

19. At the time of the issue of the said policy, and at the time of the said fire, the plaintiff was not the owner in fee simple of the land on which said insured building then stood.

20. At the time of the issue of said policy, the said insured property was mortgaged without notice to this company, and without the consent of the defendant endorsed on said policy.

21. After the issue of the said policy the said property became mortgaged without notice to this defendant and without the consent of this defendant endorsed on said policy.

22. The said insured property was at the time of the issue of said policy a manufacturing establishment, and so remained to the time of said fire, and the same was run by the plaintiff after the issue of said policy over time and extra time without special agreement therefor endorsed on the said policy.

23. After the issue of the said policy and before said fire, gun powder, fire-works, phosphorus, camphene, naphtha, benzene, benzole, chemical, crude and refined coal oils, and earth oils, or one or more of the said articles were kept and used by the plaintiff on the said insured premises without the written consent of the defendant, contrary to the provisions of the said policy.

24. After the issue of the said policy and before the said fire, said plaintiff used unclosed kerosene lamps on the said premises, and the same were so used on and in the said premises by the plaintiff without the knowledge or consent of the defendant.

25. The said insured premises became vacated after the issue of the said policy without notice to the defendant and without its consent endorsed thereon.

26. The plaintiff did not furnish to the defendant at its office, notice and proof of the said loss sixty days prior to the beginning of this suit.

27. Said plaintiff failed to comply with the provisions of said policy concerning the giving and furnishing of notice and proofs of loss.

28. The said plaintiff wholly failed to keep and perform or comply with the terms, conditions and provisions of the said policy and every of them on his part to be kept and performed or complied with.

29. No notice of loss under the said policy was received at the office of the said defendant as much as sixty days before the beginning of this suit.

30. No proofs of loss under said policy were received at the office of this defendant as much as sixty days before the beginning of this suit.

31. The said insurance was terminated at the request of this defendant, before said fire.

32. The said insurance was terminated at the option of this defendant, and notice of such termination was given to the defendant by the plaintiff, before the said fire, and the defendant before the said fire tendered the ratable proportion of the premium for the unexpired term of the policy.

33. The said policy was canceled at the option of the defendant, and notice of such cancelation was given to the plaintiff by the defendant before said fire, and the defendant was ready at the time of such cancelation to refund to plaintiff a ratable proportion of the premium for the unexpired term of the said policy and then desired so to do, but was then unable after diligent effort to find the said plaintiff for the purpose of refunding or tendering such ratable proportion of such premium.

34. The plaintiff has not complied with the terms, conditions and provisions of the said policy of insurance or any part thereof constituting conditions precedent to the liability of this defendant under said policy.

35. The interest of the said plaintiff in the said insured property was at the time of the issue of the said policy less than the entire and sole ownership thereof, which fact was not made known to the defendant, and was not waived by the defendant.

36. All and every of the contingencies expressed in said policy as contingencies or events under which the defendant

should not be liable thereon, or thereunder, happened or occurred prior to the beginning of this suit.

37. No notice of such loss or damage by fire, or of said fire was given in writing, or otherwise, to the defendant within sixty days after said fire.

38. None of the terms, conditions or provisions of said policy have been waived by the defendant.²⁵⁶

(Michigan)

To

Attorney for plaintiff.

Sir: Please to take notice that on the trial of this cause the above named defendant will give in evidence, under the general issue above pleaded, and insist in its defense, that the interest of the insured in the property mentioned in policy No., agency at, Michigan, amount of policy \$., expiring, 19.., is and was other than unconditional and sole ownership.

2. And the said defendant will further give in evidence and insist on said trial that the subject of insurance and the property covered by said policy after the issue thereof, became incumbered by chattel mortgage and otherwise without the consent or knowledge of the company.

3. Defendant will further show that there was a change in the interest, title and possession of the subject of insurance without the consent or knowledge of the company.

4. Defendant will further give in evidence and insist in its defense, that the insured concealed and misrepresented material facts and circumstances concerning the insurance, both before and after the loss.

5. Defendant will further show that there has been false and fraudulent swearing concerning and touching matters and things relating to the loss sustained by the insured.

6. Defendant will further show that the insured made false, fraudulent and dishonest representations and statements, in regard to the property covered by the policy, and the loss sustained thereunder.

7. Defendant will further show that no correct proof of loss has ever been served upon the company.

Dated

Yours, etc.

²⁵⁶ The reforegoing notice is reproduced merely to give an idea of the possible defenses that might be raised in an action on an insurance

policy: the modern tendency is to plead and urge only such defenses as are strictly applicable to the particular case.

1235 Other insurance, notice (Mich.)

To

Please to take notice that on the trial of this cause, the said defendant will give evidence and insist under the general issue above pleaded, that, if the said defendant made and delivered to the said plaintiff the insurance policy mentioned and described in the declaration filed in this cause, the same was made and delivered by said defendant upon the condition expressed therein, that, "This entire policy unless otherwise provided by agreement endorsed hereon or added hereto shall be void if the insured now has or shall hereafter make or procure any other contract of insurance, whether valid or not, on property covered in whole or in part by this policy." That after said policy was made by the said defendant and delivered to the said plaintiff by the terms of which the property mentioned and described in said plaintiff's declaration was insured against loss or damage by fire, the said plaintiff without the knowledge or consent of the said defendant, and without any agreement endorsed upon said policy or added thereto, procured another contract of insurance upon said property insured as aforesaid or upon a part thereof in another insurance company, to wit, in the of, which last named insurance policy was upon said property for the purpose of additional insurance thereon, at the time the same was burned, consumed and destroyed by fire, if it was ever burned, consumed and destroyed by fire as averred in plaintiff's declaration. By reason whereof, the said insurance policy issued by the said defendant to the said plaintiff and by the terms of which the said property was insured as aforesaid, against loss or damage by fire, became and was wholly null and void and of no validity whatever.

1236 Set off, notice (Ill.)

And the said defendant.. hereby give.. notice that under the above plea.. will also offer evidence of the following claim against the plaintiff...

That on, to wit, the day of, the said plaintiff.. and the said defendant.. entered into the written agreement which is set out as a contract in writing in the count of the declaration herein, as follows, to wit: (Set forth agreement).

That upon the construction of the said plant mentioned in the said contract, the said plaintiff.. represented and stated to the said defendant.. that the operations and efficiency of the said plant would be greatly promoted and benefited by the active co-operation, assistance and good will of a certain brew master of the said, in connection with which the said plant was to be run, and that such active co-operation, as-

sistance and good will of said brew master would be secured by the payment to said brew master of the sum of one-eighth of one cent per pound for each pound of carbonic acid gas manufactured and sold from the brewery of the said brewing company in,, and that if the said amounts should be delivered to . . h. ., the said plaintiff. ., . . he. . would as the agent of said defendant. ., deliver the same to the said brew master.

That the said defendant. . thereupon relying upon said statement of the said plaintiff. . delivered to the said plaintiff. . in addition to the compensation of one-quarter of one cent per pound for each pound of carbonic acid gas sold from the said brewery, provided for in said above written contract to be paid to plaintiff. ., the further sum of one-eighth of one cent per pound to be paid and delivered by said plaintiff. . as its agent to said brew master.

That said deliveries of said amounts aforesaid began in the month of, and thereafter the said defendant. . continued to deliver money to the amount of one-eighth of one cent per pound until and including the month of

That on the day of, the said brew master, theretofore employed at said brewery ceased to be longer employed at the said brewery and another brew master was thereafter employed, but the said defendant. . continued to deliver to the said plaintiff. . the said sum of one-eighth of one cent per pound upon each pound of carbonic acid sold from said brewery, and from the date last aforesaid, to wit,, the said plaintiff. . having as the agent of said defendant. . as aforesaid, received the additional sum of one-eighth of one cent per pound upon said carbonic acid gas sold by said brewery, for the purpose of delivering the same to the said brew master, nevertheless did not deliver the same to said brew master, but instead thereof appropriated the same to . . h. . own use. That the said brew master had no contract or agreement of any nature whatsoever with the said defendant. . for any payment to of said amounts, and the same were delivered to said plaintiff. . by defendant. . with the belief on the part of the defendant. . that said sums were being paid merely as a gratuity to said brew master.

That the items and account of said deliveries of money by said defendant. . to said plaintiff. . and the amount thereof are as follows: (Set forth account).

That during all the period aforesaid the said plaintiff. ., well knowing that the said amounts of one-eighth of one cent per pound were being delivered to . . h. . by said defendant. . with the belief on part that said amounts were being paid by plaintiff. . as agent to said brew master, nevertheless concealed from said defendant. . the fact that . . he. . w. . . . not paying and did not deliver said amounts to said brew master, and the defendant. . did not discover that said plaintiff. . had not delivered said amounts, but had appropriated the same to

..h.. own use, until, to wit, the month of, 19.., and thereupon the said defendant..demanded of the said plaintiff.. that repay to said defendant.. the amounts so retained by plaintiff.., but the plaintiff.. refused so to do, claiming that ..he.. w.... the owner.. of said amounts and entitled to retain the same.

That the said plaintiff.. thereby became indebted to the said defendant.. for money had and received to and for the use of the said defendant.. in the sum of dollars, and being so indebted the said plaintiff.. became obligated to pay the same to the said defendant.., but the said plaintiff.., although heretofore often requested to pay the same to said defendant.., ha.. not paid the same nor any part thereof to said defendant.., and retain.. the said amounts in ..h.. own hands, to the damage of the defendant.. in the sum of dollars.

Wherefore the said defendant.. pray.. that the said amount may be set off and allowed to the said defendant.. as against any sum found due to the plaintiff.., if any be found, and in satisfaction thereof, and that for the excess of said set off over any sum found to be due to the plaintiff.. from the defendant.. the said defendant.. may have judgment against plaintiff.., with costs herein incurred.

(Michigan)

Please to take notice, that the said defendant.. will, on the trial of this cause, insist upon and give in evidence under the general issue above pleaded, that before and at the time of the commencement of this suit, the said plaintiff and still indebted to the said defendant.. in the sum of dollars, for the price and value of goods before then sold and delivered by the defendant.. to the plaintiff.. at request. And in a like sum for the price and value of work then done, and materials for the same provided by the defendant.. for the plaintiff.., at request; and in a like sum for the price and value of work then done by the defendant.. for the plaintiff.., at request; and in a like sum for the money then lent by the defendant.. to the plaintiff.., at request; and in a like sum for money then paid by the defendant.. for plaintiff.., at request; and in a like sum for money then received by the plaintiff.. for the use of the defendant..; and in a like sum for money then found to be due from the plaintiff.. to the defendant.., on an account stated between them; and in a like sum for the use of money then due from the plaintiff.. to the defendant.., and by the defendant.. forborne to the plaintiff.., at request. Which said several sums of money, or so much thereof as will be sufficient for that purpose, the said defendant.. will set off and allow to the plaintiff.. against any demand or demands of

said plaintiff.. to be proved by on said trial, and have the balance certified in favor.

Dated, the day of, 1....

Yours, etc.,

.....
Attorney for defendant..

To
Attorney for plaintiff.²⁵⁷

1237 Use and occupation

Under the general issue to the common counts for use and occupation, the defendant may show the substitution of a new agreement for the one sued upon. In Michigan, if damages are claimed by way of recoupment, notice of such a claim must be added.²⁵⁸ So, the defense that the premises were untenable cannot be shown in that state under the general issue alone.²⁵⁹

AFFIDAVIT OF DEFENSE OR MERITS

1238 Illinois, necessity

A plea may be stricken from the files for want of an affidavit of merits; and in case the plea is stricken from the files, the plaintiff is entitled to judgment by default.²⁶⁰

1239 Illinois, affidavit

(Venue)

..... being first duly sworn depose.. and say..
that ..he.. the defendant.. in the above entitled cause,

²⁵⁷ In case of set off founded upon an open account or account stated, the defendant may annex to his plea or notice of set off, a copy of the account and may make an affidavit, by himself or by someone in his behalf, showing the amount or balance claimed by him, or that such amount or balance is justly owing and due to him, or that he is justly entitled to have such account or balance set off against the claim made by the plaintiff; a copy of which account and affidavit, with a copy of the plea and the notice, must be served upon the plaintiff or his attorney. (10191), C. L. 1897 Mich.

Upon the making of the forego-

ing affidavit, the plaintiff, or someone in his behalf must, within ten days after service of a copy of the defendant's plea and affidavit, in circuit courts, and before trial in other cases, make an affidavit denying said set off or any portion thereof and his indebtedness or liability thereon, and must serve a copy of such affidavit upon the defendant or his attorney. (10191), C. L. 1897 (Mich.).

²⁵⁸ Conkling v. Tuttle, 52 Mich. 630, 632 (1884).

²⁵⁹ Holmes v. Wood, 88 Mich. 435, 438 (1891).

²⁶⁰ New York National Exchange Bank v. Reed, 232 Ill. 123, 125 (1908).

and that ..he.. verily believe.. that ..he.. ha.. a good defense
upon the merits as to the whole of the said plaintiff.. demand.

.....
Defendant.

Subscribed, etc.

.....
Notary Public.

Co-defendant

(Venue)

....., being first duly sworn, deposes and says that
he is one of the defendants in the above entitled cause and makes
this affidavit for himself and for and on behalf of and at the
special request of his said co-defendant,; affiant
further says that he verily believes that he and said
and each of them have a good defense on the merits to the whole
of the said plaintiff's demands.

.....
Subscribed, etc.

1240 Maryland

I hereby certify that on this day of,
19.., before me, the subscriber, a justice of the peace of the
state of Maryland, in and for county, personally
appeared,, administratrix c. t. a. of,
deceased, and made oath in due form of law that every plea
so pleaded by her is true, and that she does not admit the plain-
tiff's claim, or any part of the same, to be due and owing, and
that the whole amount of said claim is disputed; that she has
a bona fide intention of making defense and contesting the right
of the plaintiff to judgment in this cause; that she does not
resist the entry of judgment for delay or for the purpose of
giving priority to others, and that she is advised by counsel to
file said pleas.

.....
Justice of the peace.

Counsel's certificate

This is to certify that I advised to make the
foregoing oath, and to file said plea.

.....
Defendant's attorney.

No.	Return Day	19... court	v.	Mr., Clerk.	Please file within pleas, affidavit of defense, and certificate of counsel.	Def't's Atty.	Service of copy of pleas admitted.	Plf.'s Atty.
----------	------------	-------	-------------	-------	----	-------	------------------	---	-------	---------------	-------	------------------------------------	-------	--------------

Co-defendant

(Venue)

On this day of, 19..., before me, the subscriber, a of the state of Maryland, in and for county, personally appeared, one of the above named defendants and made oath in due form of law, that every plea above pleaded is true, that no part of the plaintiff's demand is admitted to be due or owing, but that the whole of plaintiff's claim is disputed; and further that he, the affiant, believes the defendants will be able at the trial of the cause to produce sufficient evidence to support the said plea and that he is advised by counsel to file said plea.

.....
(Official character)

Counsel's certificate

I hereby certify that we advised the defendants making the above oath and filing said plea to the same.

.....
Attorneys for defendants.

Corporation

(Venue)

On this day of, 19..., before me, the subscriber, a notary public, in and for the city and state aforesaid, personally appeared, president and agent of the defendant corporation in the above entitled cause, and made oath in due form of law that every plea so pleaded by the defendant is true; and further, that neither the defendant nor himself as president and agent of said defendant corporation admits any part of the plaintiff's claim to be due and owing, but disputes the whole of said claim; and further, that he, the affiant, verily believes that the defendant will be able at the trial of said cause to produce sufficient evidence to

support the said pleas as to the whole amount of the plaintiff's claim disputed by the defendant and himself as president and agent as aforesaid; and further, that the defendant and himself as president and agent as aforesaid are advised by counsel to file the said pleas; and he further swears that he is the president and agent of the defendant corporation and is duly authorized to make this affidavit, and has personal knowledge of the matters therein stated.

Witness my hand and notarial seal.

(Seal)

.....
Notary Public.

Counsel's certificate

I hereby certify that I advised the defendant corporation and the president and agent thereof in the above entitled cause to file the foregoing pleas and to make the foregoing affidavit.

.....
Attorney for defendant.

1241 Michigan, necessity

In actions upon open accounts, or accounts stated, the defendant must file with his plea an affidavit made by himself or his agent, denying the amount claimed to be due; and he must serve a copy thereof upon the plaintiff, or his attorney, if the plaintiff has filed with his declaration or process an affidavit of amount due and a copy of the account and has duly served them upon the defendant.²⁶¹

1242 Mississippi

(Venue)

Personally came before me the undersigned officer in and for county in the state of Mississippi,, the defendant in the above styled cause who makes oath that the account sued on in this cause is not correct in that (Set forth special matter constituting the errors).

.....

Sworn, etc.

1243 Virginia

(Venue)

..... being first duly sworn, deposes and says that he is the president of the defendant in the above

²⁶¹ (10191), C. L. 1897.

entitled action, and its duly authorized agent in this behalf, and that he is familiar with all the transactions between the plaintiff and defendant in said action, and that he verily believes that the plaintiff is not entitled to recover anything from the defendant on the claim asserted in said action.

Subscribed, etc.

1244 West Virginia

(Venue)

....., being first duly sworn, says, that he is the defendant in the above styled action and that there is not, as he verily believes, any sum due from him to the said plaintiff upon the demand or demands stated in the said plaintiff's declaration.

Taken, subscribed and sworn to, etc.

BILL OF PARTICULARS

1245 District of Columbia

..... Dr.

To

To (Give itemized statement of account or demand).

1246 Illinois

.....

To Dr.

To money paid to satisfy judgment for damages in the case of v.

Interest on money paid to satisfy said judgment after, etc.

Total

Plaintiff's attorney.

1247 Maryland, demand

The defendants by their attorney demand the particulars of the plaintiff's claim.

1248 Maryland, cross-motion

The plaintiff by his attorney, moves that the defendant's demand for a bill of particulars be not received, because the declaration in this case is based on an agreement under seal which is embodied in the same, and for other reasons to be made known at the hearing.

1249 Michigan, demand

Now comes the above named defendant by, its attorney, and demands a more specific bill of particulars of plaintiffs' claim for the recovery of which suit is brought.

.....
Attorney for defendant.

Dated, etc.

To,
Attorneys for plaintiffs.

1250 Michigan, notice and particulars

To the above named defendant:

Take notice, that a bill of particulars of the demands of the plaintiff under the money counts is given below.

.....
Plaintiff's attorney.

To Dr., 19...

To money paid under protest upon a pretended tax, to release property of said company from a levy made for the collection of said tax \$.....

Interest thereon from

1251 Mississippi, application

(Venue)

Personally appeared before me the undersigned authority, who makes affidavit in the above styled cause that for the purpose of defense and the trial of said cause, it is necessary that the plaintiff be more specific in his bill of particulars and items going to make up the damage of dollars for which plaintiff is suing. He, therefore, prays that the court may require plaintiff to file a more complete bill of particulars specifying the items, facts and circumstances relied upon to show that defendant failed or refused to carry out and complete his contract, specifying time and places where the repeated demands alleged to have been made on defendant were made; that the plaintiff file a more complete bill of particulars for what work plaintiff had to pay the dollars, alleged to have been paid for completing the work on said building; a more complete bill as to the labor for which said dollars, or any part thereof was paid; and a more complete bill of materials for which the

..... dollars, or any part thereof was paid. (Set forth as many other points upon which information is desired as the case is susceptible).

.....
Defendant.

Sworn, etc.

1252 Mississippi, particulars and affidavit

(Set forth account in the usual form which verify as follows):
(Venue)

Personally appeared before me the undersigned, a notary public of said city, county and state agent for
....., who being duly sworn, says that the account hereto attached for dollars is a true statement of the amount paid out by this affiant, as agent for on the contract of and that the same is correct as stated, and that the said sum is due from the party against whom it is charged, and that no part of it has been paid.

Sworn, etc.

1253 Mississippi, counter-affidavit

(Venue)

Personally appeared before me the undersigned authority, who makes affidavit that he is in no way indebted to for any of the sums set out in his bill of particulars in the above styled cause; that he does not owe the amount therein set out, to wit (enumerate items not owing.)

Affiant further says that he is not indebted to the said
.....in any sum whatever, that the above set out account is in every particular incorrect, and that he does not owe any or either of the items therein mentioned.

Sworn, etc.

VERDICT

1254 Florida

We, the jury, find for the plaintiff and assess his damages at dollars with interest from
..... till date, and in addition thereto the sum of dollars as a reasonable attorney's fee.

So say we all.

.....
Foreman.

1255 Illinois, requisites

In assumpsit it is not necessary that a verdict should be in writing, but the same may be announced by word of mouth in open court, by the foreman of the jury.²⁶²

1256 Michigan, variance

Under Rule 27 (c) the jury may disregard a misjoinder of defendants where the proof shows that the contract alleged to have been made jointly by all of the defendants was, in fact, made by less than all; and they may render a verdict against those who made the contract, or those who remain liable upon it, the variance between the proofs and the declaration being considered as an unessential technicality.²⁶³

1257 Mississippi

We, the jury, find for the plaintiff in the amount of dollars.

b

We, the jury, find for the defendant.

1258 Virginia

We, the jury, on the issue joined, find for the plaintiff, and assess the damages at dollars and cents (\$.....) with interest from

b

We, the jury, find for the plaintiff and assess its damages at dollars with interest thereon from the until paid, subject to credits as follows; credit by dollars as of and dollars as of

.....

Foreman.

c

We, the jury, ascertain the amount due the plaintiff to be dollars to be deducted from dollars the amount we find due the defendant, and after deducting the sum allowed plaintiff from the amount ascertained for the defendant, we find a verdict for the defendant for the balance of dollars.

.....

Foreman.

²⁶² Illinois, Ia. & Minn. Ry. Co. v. Powers, 213 Ill. 67, 68 (1904).

²⁶³ Root & McBride Co. v. Wal-

ton Salt Assn., 140 Mich. 441, 444 (1906).

1259 West Virginia

We, the jury, find for the plaintiff and assess its damages at dollars.

JUDGMENT**1260 Generally; amount, interest**

A judgment in assumpsit should be for a certain amount as damages, and not for debt and damages.²⁶⁴ The recovery of interest depends entirely upon statute. At common law, no interest was recovered in any case.²⁶⁵ Under Illinois statute, interest at a rate exceeding five per cent per annum can be recovered only by virtue of a contract.²⁶⁶ Interest is not chargeable upon an open account when some of the items in it are disputed.²⁶⁷

1261 Motion for judgment (District of Columbia)

Comes now the plaintiff by his attorney and moves the court for a judgment against defendant for want of a sufficient affidavit of defense.

.....
Attorney for plaintiff.

1262 Judgment (Mississippi)

(For commencement and conclusion see Chapter XCV) It is therefore hereby considered by the court that the plaintiff take nothing and that he pay all costs in this behalf expended to be taxed, and the defendant do have and recover of and from said plaintiff all such cost so expended in this cause, for which let execution issue.

(Virginia)

Therefore it is considered that the plaintiff recover against the defendant dollars, with interest thereon after the rate of per centum per annum from the day of, 19.., until paid, and h.. costs by ..h.. about ..h.. suit in this behalf expended. And the said defendant in mercy, etc.

²⁶⁴ Lyon v. Barney, 1 Seam. 387 (1837).

²⁶⁵ Illinois Central R. Co. v. Cobb, Blaisdell & Co., 72 Ill. 148, 152, 163 (1874).

²⁶⁶ Schwitters v. Springer, 236 Ill. 271, 275 (1908).

²⁶⁷ Flake v. Carson, 33 Ill. 518, 526 (1864); Sec. 2, c. 74, Hurd's Stat. 1909, p. 1358.

CHAPTER XXII

CASE

IN GENERAL

§§

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§§

- 1285 Conspiracy concerning local improvement, Narr.
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- 1291 Drainage inadequate, Narr.
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- 1298 Fraud and deceit; declaration requisites
- 1299 Fraud and deceit; collusion between defendant and real estate agent, Narr.
- 1300 Fraud and deceit; incumbance, nonresident, Narr.
- 1301 Fraud and deceit; infringement of patent, Narr.
- 1302 Fraud and deceit; insurance policy, surrender, Narr.
- 1303 Fraud and deceit; notes secured by bogus trust deed on leasehold, Narr.
- 1304 Fraud and deceit; oil stock, Narr.
- 1305 Fraud and deceit; shares of capital stock, Narr.
- 1306 Fraud and deceit; unrecorded trust deed, Narr.
- 1307 Highways and bridges; action, parties

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- 1308 Hotel and inn-keepers, stolen property, action
 1309 Inadequate fire protection, action
 1310 Infectious premises, Narr.
 1311 Interference with public sale, declaration requisites

INTOXICATION

- 1312 Nature and scope of action, parties
 1313 Principal and surety, action
 1314 Joinder of causes
 1315 Declaration requisites, joint liability
 1316 Brother's intoxication, Narr.
 1317 Husband's intoxication, Narr.
 1318 Parent's intoxication, Narr.
 1319 Son's intoxication, Narr.

LIBEL

- 1320 Malice, proof
 1321 Joinder of counts
 1322 Declaration requisites
 1323 Campaign contribution sought by official, Narr.
 1324 Financial responsibility, Narr.
 1325 Hatred, contempt and ridicule, action
 1326 Hatred, contempt and ridicule, Narr.
 1327 Minister's conduct, Narr.
 1328 Pleadings, libelous matter, action
 1329 Pleadings, libelous matter, Narr.
 1330 Privileged communications proof

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- 1331 Nature and scope
 1332 Declaration requisites generally
 1333 Abuse of process, action
 1334 Abuse of process, declaration requisites
 1335 Attachment, action
 1336 Attachment, Narr.

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- 1337 False imprisonment, action
 1338 False imprisonment, Narr.
 1339 Injunction, action
 1340 Replevin, Narr.
 1341 Malpractice as physician, Narr.
 1342 Nuisance private; action, notice, damages
 1343 Nuisance, public; action
 1344 Nuisance, declaration requisites
 1345 Obstructing navigation, bridge; action
 1346 Obstructing navigation, bridge; declaration requisites
 1347 Obstructing public street, railroad; action
 1348 Obstructing public street, railroad; declaration requisites
 1349 Overflow of lands, dam across slough, Narr.
 1350 Overflow of lands, ditch improperly constructed, Narr.
 1351 Overflow of lands, drainage channel, action
 1352 Overflow of lands, drainage channel, Narr.
 1353 Overflow of lands, embankment; action
 1354 Overflow of lands, embankment, Narr.
 1355 Overflow of lands, levee construction; action
 1356 Overflow of lands, levee construction, Narr.
 1357 Overflow of lands, notice, requisites
 1358 Overflow of lands, sewer insufficient, Narr.
 1359 Public improvement, action
 1360 Replevin bond, insufficient, action
 1361 Reversion, action
 1362 School schedule, refusal to certify, declaration requisites
 1363 Seduction, action
 1364 Seduction, parties

§§

- 1365 Seduction, joinder of counts
 1366 Seduction, declaration requisites

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- 1367 Action, nature and scope
 1368 Parties
 1369 Declaration requisites, proof
 1370 Larceny, Narr.
 1371 Perjury, Narr.
 1372 Woman's character, Narr.

- 1373 Sparks from locomotive, Narr.
 1374 Sparks from traction engine, Narr.

- 1375 Strikes, action
 1376 Strikes, Narr.
 1377 Telegrams, negligent transmission, action
 1378 Telegrams, negligent transmission, Narr.

TRANSPORTATION

- 1379 Bill of lading, limitation
 1380 Jurisdiction
 1381 Cattle, feeding and watering, action
 1382 Cattle, injured and lost, Narr.
 1383 Goods damaged, Narr.
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- 1385 Vicious animals, action
 1386 Vicious animals, declaration requisites
 1387 Vicious animals, Narr.
 1388 Water supply cut off, Narr.
 1389 Wrongful discharge effected by employer's liability insurer, Narr.

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- 1390 Accord and satisfaction, pleading
 1391 Accord and satisfaction, plea
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- 1393 Conspiracy between contractor and improvement board
 1394 Foreign laws and decisions, pleading
 1395 Fraud and deceit; inquiry, failure to make
 1396 Fraud and deceit; statute of frauds, general issue
 1397 Intoxication, death unforeseen
 1398 Intoxication, life insurance
 1399 Intoxication; regulation and prohibition, scope

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- 1400 Demurrer
 1401 Denial of justification, proof
 1402 General issue, scope
 1403 Justification; plea, requisites
 1404 Justification; notice, requisites

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- 1405 Attachment, waiver
 1406 False imprisonment, *res judicata*
 1407 Justification; *res judicata*, plea, requisites
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 1409 Probable cause, law and fact
 1410 Probable cause, pleading, proof
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SLANDER

- 1415 Generally
 1416 General issue, proof
 1417 Justification; plea or notice, nature

1418 Justification; burden of proof, practice	VERDICT
1419 Justification; plea, requisites	1425 Florida
1420 Justification; notice, sufficiency	1426 Illinois, dram-shop
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IN GENERAL

1263 Case and trespass, distinction, joinder

The distinction between trespass and case clearly appears where there is a disturbance of the possession and damage to real estate that is held by two distinct ownerships, that of the owner and that of the lessee, the latter occupying the premises. In the event of damage, the lessee alone has a right to an action of trespass, while the owner has a right of action on the case for the damage to his reversion.¹ Case, and not trespass, is maintainable for an injury produced by a cause that is known to the wrongdoer to be of a dangerous nature or character.²

At common law different causes of action cannot be joined in one declaration or suit. Therefore, counts in case could not be joined with counts in trespass. By Illinois statute, the technical distinction between the forms of actions of trespass and actions on the case has been abolished, and the joinder of counts in the two forms of action is permissible. But the statute does not affect the substantial rights or liabilities of the parties, and the averments and the proofs necessary to sustain either cause of action are the same as at common law.³

1264 Remedial statutes

A party who has sustained damages by a breach of a remedial statute may bring an action on the case for their recovery, unless the statute requires the bringing of a different form of action.⁴

¹ Halligan v. Chicago, Rock Island Ry. Co., 15 Ill. 558, 560 (1854).

² Stumps v. Kelley, 22 Ill. 140, 143 (1859).

³ Chicago Title & Trust Co. v. Core, 223 Ill. 58, 63 (1906).

⁴ Mount v. Hunter, 58 Ill. 246, 248 (1871).

DECLARATION REQUISITES

1265 Time, videlicet

A plaintiff is not confined to the exact time that is alleged in his declaration, if the time is stated under a videlicet. The offense charged may be shown to have been committed upon any day within the period of the statute of limitations.⁵

1266 Duty, contractual

In an action on the case for a violation of a contractual duty it is sufficient to state in substance only so much of the contract as has been broken.⁶

1267 Damages, time

In an action on the case it is not necessary that the declaration should state the time or times when the damages were sustained, as the legal effect of the allegation of damages is that they were sustained when the wrongful act of the defendant was committed and on divers other days between that time and the commencement of the suit.⁷

1268 Special damages, proof

An averment of special damages must be specific and not general.⁸ The allegation of special damages is a matter of aggravation as a substantive allegation of fact, and not an inference of law resulting from facts antecedently stated.⁹ Without proof of actual damages, a plaintiff cannot, at common law, recover substantial damages.¹⁰

SPECIAL CAUSES OF ACTION AND DECLARATIONS

1269 Alienating husband's affections, Narr. (Ill.)

¹¹ For that whereas, the defendant, contriving and wickedly intending to injure the plaintiff and to deprive her of the society and assistance of, the husband of the plaintiff, on, to wit, the day of, 19...

⁵ Johnston v. Disbrow, 47 Mich. 59, 61 (1881); Toledo, Peoria & Warsaw Ry. Co. v. McClannon, 41 Ill. 238, 240, 241 (1866).

⁶ American Express Co. v. Pinckney, 29 Ill. 392, 407 (1862).

⁷ McConnell v. Kibbe, 33 Ill. 175, 179 (1864).

⁸ Grand Rapids & Indiana R. Co. v. Southwick, 30 Mich. 444, 447 (1874).

⁹ McConnell v. Kibbe, *supra*.

¹⁰ Raisor v. Chicago & Alton Ry. Co., 215 Ill. 47, 57 (1905).

¹¹ See Section 211, Note 60.

and on divers other days between that time and the commencement of this suit, in the county of, and state of Illinois, did wilfully and maliciously destroy and alienate from the plaintiff the affection then and there had by the said, then and there the husband of the said, for the said, the said in no wise consenting thereto: by means whereof the plaintiff has from thence hitherto wholly lost and been deprived of the society, affection, assistance and comfort of the said, her said husband, in her domestic affairs, which the plaintiff during all of said time ought to have had. To the damage, etc.

By criminal means

For that whereas, the defendant, contriving and wickedly intending to injure the plaintiff and to deprive her of the society and assistance of, the husband of the plaintiff, and to alienate and destroy his affection for the plaintiff, on, to wit, the day of, 19.., and on divers other days between that day and the commencement of this suit in county, Illinois, and in the city of, Illinois, defendant wrongfully and wickedly debauched and carnally knew the said, then and there and still being the husband of the plaintiff, and thereby the affection of the said for the plaintiff was then and there alienated and destroyed; and also, by means of the premises, the plaintiff has from thence hitherto wholly lost and been deprived of the society and assistance of the said, her said husband in her domestic affairs, which the plaintiff during all that time ought to have had, and might otherwise and would have had: To the damage, etc.

1270 Alienating wife's affections, Narr. (Mich.)

For that whereas, the said plaintiff was in the year married to one and as the result of said marriage there was born to said parties children, to wit:, aged years, and aged years, both of whom are now living.

That this plaintiff and the said always lived in happiness, peace and comfort together until on or about the day of, 19.., when the said defendant wrongfully and wickedly intending to injure the plaintiff and to deprive him of the affection, comfort, fellowship, society and association of the said and their said children and of the aid and assistance of the said, and to alienate and destroy the affections of her the said for the plaintiff, heretofore, to wit, on the day and year last aforesaid, and on divers other days and times and times between that day and the time of the commencement of this

action, at, to wit, in said county and in various other places, carried on a secret correspondence with the said and cajoled and flattered her, the said and made her many promises of love and held various clandestine meetings with her and gave her various presents and things of value, and by various arts and schemes and devices, he, the said defendant,¹² (alienated and destroyed the affections of her, the said, for this plaintiff and induced her to leave this plaintiff and to take with her the said children and refuse longer to give him her affection, comfort, society, fellowship, aid and assistance which the said plaintiff had possessed and enjoyed before the committing of said wrongful acts by the said defendant).

By means whereof the plaintiff from thence hitherto has wholly lost all the affection, comfort, fellowship, society, aid and assistance of the said wife and the comfort, society and fellowship of his said children and was and is caused to suffer great mental anguish, distress and pain, and great annoyance and suffering in his household and was and is wholly humiliated among his neighbors and acquaintances and friends, and has been otherwise damaged.

1271 Bridge unrepaired, Narr. (Md.)

For that the plaintiff had a contract with the M to construct for it certain concrete piers in river or the abutting shores thereof in county, in the construction of which piers certain lumber, sand, cement and other material were needed and which material the plaintiff was obliged under said contract to provide and convey to the place where said piers were to be constructed as aforesaid. That said contract was in writing and dated the day of, 19.., and that by the terms thereof plaintiff was required to commence work on said piers within days from said date, and was required to complete said piers according to the specifications in said contract set out within working days from the date of said contract, and in said contract was further provided a penalty of dollars per day to be paid by the plaintiff for every day beyond said period of working days required for the completion of said piers as aforesaid. That preparatory to carrying out said contract on his part, the plaintiff provided lumber.

¹² To charge alienation by means of adultery omit matter between parentheses and insert instead this:

"wrongfully debauched and carnally knew the said then and there and still being the wife of plaintiff and did have illicit intercourse with her, the said and did commit adultery with her,

the said, whereby and by means of which arts, schemes, devices, clandestine meetings, promises of love, giving of presents and the committing of adultery the affection of the said for the said plaintiff was alienated and destroyed."

cement and other material and deposited the same at or near station on said M line of railroad, commonly known as "....." and provided also sand a short distance below station, all of which material the plaintiff was prepared to haul from said points to the point where said piers were to be constructed, said haul to be over the county public road there situate leading from the points above described through the property of one K and thence across an arm of river by a public county bridge to the lands of one L, through whose lands the plaintiff had made arrangements to haul said material for the purposes aforesaid. That said public county road through the lands of K and the said public county bridge, which was then and there part of the public highway as aforesaid over said arm of river was the only county public road affording access from said station and its neighborhood to the place where said concrete piers were to be constructed as aforesaid by the plaintiff and the plaintiff had no other access by the public highway for himself, his servants and agents, his beasts, carts and wagons to transport the said material from station as aforesaid to the said place where said piers were to be constructed as aforesaid. And the plaintiff further said that relying upon the said county public road and bridge as the means of access to said place of constructing said piers as aforesaid, he did enter into said contract to construct said piers, and did lay out and expend large sums of money in the purchase of said lumber and cement and other materials and in providing sand as aforesaid and in depositing the same at or near station as aforesaid to be from there transported as aforesaid by way of said county road and bridge to the said place of constructing said piers.

That said bridge over said arm of river was suffered and permitted by the defendant to become wholly impassable, although the defendant had the custody and control thereof and was responsible for the proper maintenance thereof for public travel, and the defendant unmindful of its duty in the premises, and with notice of the bad condition of said bridge, suffered and permitted the same to become and to remain out of repair and broken down, so that it was impossible to pass over said bridge with carts and wagons and to transport over said bridge the aforesaid material prepared for the construction of said piers as aforesaid. That the situation of the plaintiff in the said regard was peculiar and different from the situation of others in respect to said road and bridge and the use thereof, in that the plaintiff was under contract to construct said piers as aforesaid, and could not provide and transport to the place where said piers were to be constructed material other than that already provided as aforesaid within the time required by said contract and for many days thereafter, and could not transport by any public highway the material already

provided for said purpose to the said place of construction, and was by reason thereof required to lay out and expend large sums of money in and about the transportation of said material to the place of constructing said piers greatly in excess of the cost of hauling the same over said public road and bridge as the plaintiff was entitled and expected to do when he entered into said contract.

And the plaintiff saith that he hath not sustained a loss in common with the other citizens of the county there inhabiting and residing, but that he hath sustained and suffered a distinct and peculiar loss by reason of the action of the defendant in the premises as herein before set out.

Wherefore the plaintiff brings this suit and claims
 dollars damages.

1272 Cable slot, defective construction, Narr. (Md.)

And for that the defendant corporation maintains and operates for its own uses and purposes a line of street railways in, along and upon the streets of the city of over which it operates and propells cars by electricity and other force and power, that among the streets so occupied and used by the defendant at the time of the happenings and wrongs and grievances hereinafter complained of was street then and there a public highway between street and street likewise public highways of said city. That in the construction of its tracks and appliances for the propulsion of its cars, it constructed what is known as a cable slot in the bed of said street, which consisted of a slot three-fourths of an inch wide on the straight track and seven-eighths of an inch wide around the curves of said track, which slot opened into an underground conduit or ditch about twelve feet in circumference, in which a moving cable was operated to propell its cars, and that when kept in the condition as originally planned and in accordance with the plans and specifications filed in the city commissioner's office, there was no damage to the traveling public who used said highways with their teams drawn by horses, but when allowed to become out of repair and wider than originally contemplated, the same became a nuisance to the traveling public and dangerous to life and property; and that the defendant in total disregard of its duty to the traveling public, allowed said cable slot, situated as aforesaid in the center of each of its east and westbound tracks to become more than three-fourths of an inch wide and so wide that the wheels of an ordinary vehicle which is usually used for the conveyance of passengers and drawn by a horse or horses could drop into the said slot; and that on or about, 19.., the plaintiff, while exercising due care and driving in his buggy, drawn by his horse, on said street, between

and streets, by reason of the negligence of the defendant in allowing said slot to become a public nuisance and to become out of repair and not as originally shown by the plans and specifications filed with the city commissioner, the wheels of his buggy dropped into said slot and became caught, whereby said buggy was demolished, the horse thrown and injured severely and permanently, and required the services of a veterinary surgeon and medicines and attention, and the harness was broken and torn to pieces requiring repairs; for all of which the plaintiff has been put to great costs and expense, and the plaintiff is otherwise injured and damaged; and the plaintiff says that all of said injuries to his horse, harness and buggy were directly caused by the negligence and want of care of the defendants, its agents and servants in the premises and without negligence and want of care of the plaintiff directly thereunto contributing. Wherefore this suit is brought. And the plaintiff claims \$. as his damages.

1273 Cattle, diseased running at large, action

An action on the case is maintainable for causing a person's cattle to become infected by permitting diseased sheep, or domestic animals, to run at large.¹³

1274 Cattle-guards, action

It is the duty of a railroad company, under the Illinois Railroad Fencing act, to enclose the fenced portion of its right of way by suitable and sufficient wing fences and cattle-guards whenever it is the duty to fence ends, regardless of whether another railroad company owes a similar duty and neglects to perform it. For a failure to perform this duty a railroad company is liable for damages resulting therefrom.¹⁴

1275 Cattle-guards, Narr. (Miss.)

The plaintiff is a railroad company, incorporated under the laws of Mississippi and engaged in the business of operating a railroad, and has now and had at the times hereinafter set out a railroad running from to, Mississippi; that said railroad enters enclosed land near , Mississippi in which inclosure plaintiff has land, the point at which said railroad enters said enclosed land being at the first cattle gap south of said station of ; that it was the duty of the defendant where its line of railroad so

¹³ Mount v. Hunter, 58 Ill. 247; Sec. 258, c. 38, Hurd's Stat. 1909, p. 803.

¹⁴ Illinois Central R. Co. v. Davidson, 225 Ill. 618, 624 (1907).

entered the said enclosed land to construct and maintain a necessary and proper stock gap cattle-guard; that defendant in the years wholly disregarded its duty in the premises and refused to erect and maintain such cattle-guard and stock gap, the one hereinbefore mentioned being improper and entirely insufficient to keep cattle and other stock out of said enclosed land.

Plaintiff alleges that during the years, plaintiff was damaged by cattle and stock coming into said enclosed land over said defective cattle gap and eating and destroying his crops of cotton, corn and peas, said damages appearing fully by a bill of particulars filed herewith as a part hereof as exhibit "A" hereto attached, showing damages in the sum of dollars.

1276 Cattle killed, declaration, requisites

In an action on the case against the railroad company for killing plaintiff's cattle, the declaration need not aver that the killing was done on defendant's railroad track, because the gist of the action is the mismanaging of the locomotive engine, which may be done in any place.¹⁵

1277 Cattle killed, Narr. (W. Va.)

For that heretofore to wit, on the day of , 19.., at the county of aforesaid, the said plaintiff owned and was possessed of a horse of great value, to wit, of the value of dollars; and the said defendant was then and there the owner, and possessed of a certain railway in the said county of, which it used and operated with its locomotive engines and cars under the care, management and direction of its servants and agents in that behalf. Nevertheless the said defendant, then and there, by its said servants and agents, so improperly and negligently used, managed, ran, and operated its said locomotive engines and cars, that by and through the negligence, carelessness, and improper conduct of the said defendant, by its servants and agents in that behalf, the locomotive engine and cars of the said defendant, then and there, ran upon and over the said horse of the said plaintiff, and thereby, and then and there broke the leg of the said horse, and the said horse of the said plaintiff, thereby, then and there became and was rendered of no use or value to the said plaintiff, to wit, on the day and year aforesaid at the county aforesaid, wherefore, etc.¹⁶

¹⁵ *Baylor v. Baltimore & Ohio R. Co.*, 9 W. Va. 270, 280, 281 (1876); *Housatonic R. Co. v. Waterbury*, 23 Conn. 101, 108 (1854).

¹⁶ *Blaine v. Chesapeake & Ohio R. Co.*, 9 W. Va. 252, 261 (1876).

b

For that the said defendant heretofore, to wit, on the day of, 19.., at the county aforesaid, was a corporation, and owned and operated a certain railroad called the running from the city of, through the county aforesaid to the city of, and on the said day of, 19.., at the county aforesaid, the said defendant negligently, carelessly and wrongfully caused a train of cars upon its said railroad and under said defendant's control to be propelled and driven with great force in and upon the fat cattle of the plaintiff, whereby of said fat cattle were instantly killed, and several others were greatly bruised, wounded and injured, without the fault or negligence of the plaintiff, and solely by the said negligence and carelessness of the said defendant in this, that the said defendant seeing the plaintiff's said fat cattle upon its said railroad, and well knowing that the said cattle were upon said railroad without any fault, negligence or carelessness of the plaintiff, the said defendant recklessly, carelessly, negligently and wrongfully propelled and drove its locomotive engine and train of cars upon and over said fat cattle, and did not sound the whistle of said locomotive engine nor slack the speed of said train of cars, nor use other precaution or means to prevent the injury aforesaid, but on the contrary, the said defendant did wantonly, carelessly and negligently commit the injury and wrong aforesaid, in manner aforesaid; by reason whereof the plaintiff says he is greatly injured (said cattle which were then and there killed as aforesaid being of the value of dollars, and the said cattle injured and wounded as aforesaid being of the value of dollars), and hath lost said cattle, and is damaged to the extent of dollars, and therefore brings this suit, etc.¹⁷

1278 Change of grade, action

A municipality, and anyone acting under its authority, is liable in damages caused by a change of grade of a street whereby access to private property is obstructed, or the property has been substantially depreciated in value. This right of action does not necessarily arise from a wrongful act of the municipality; but it rests upon the constitutional provision that no private property shall be taken or damaged without just compensation.¹⁸

¹⁷ Hawker v. Baltimore & Ohio R. Co., 15 W. Va. 628 (1879).

¹⁸ Shrader v. Cleveland, Cincinnati, Chicago & St. L. Ry. Co., 242 Ill. 227, 229 (1909); Chapman v.

Staunton, 246 Ill. 394, 397 (1910); Grant Park v. Trah, 218 Ill. 516, 519 (1905); Sec. 13, art. 2, Const. 1870 (Ill.).

1279 Change of grade, Narr. (Ill.)

For that whereas heretofore, to wit, on the day of 19.., and for years prior thereto, the plaintiff was, and still is, the owner and in possession of the premises known and described as (Insert legal description) in the, county and state of Illinois, together with the appurtenances thereunto belonging.

And plaintiff avers that prior to and at the time of the acts herein complained of, a certain street in said, to wit, street, extended along the south side and adjoined the said premises thereof for a distance of, to wit, feet, and another certain street, to wit, street, in said, extended along the east line adjoining said premises for a distance of, to wit, feet. That at the time last mentioned there were situate on said premises certain buildings belonging to said plaintiff, to wit: one large story brick building, adjoining and fronting upon said street, located west of said street a distance of, to wit, feet; one other certain building, located on said premises fronting and adjoining upon said street, and located west of said street, a distance of, to wit, feet (Describe any other, if any, and give building location). All of which said buildings then and there had basements thereunder and had been erected thereon, to wit, years prior to the commission of the acts herein complained of, and were at said last mentioned time, and had been, used for business purposes, and during said times all of the said buildings then and there, had direct and convenient access to and from said streets for air, light, persons and vehicles to pass to and from the same. That at the time said buildings were erected, the grade of said streets was level, and said buildings were constructed with due regard to the grade then existing, that is to say, the foundation of each of said buildings and the ground floor was erected and carried above the grade of said streets, a distance of, to wit, feet.

That afterward, to wit, on the day of, 19.., while plaintiff was in possession and enjoyment of his said premises as aforesaid, said defendant, regardless of the rights of said plaintiff and without the knowledge or consent of plaintiff, wrongfully and negligently, built and constructed and caused to be built and constructed, certain public sidewalks of cement and other permanent walks, upon and along the north side of said street, adjoining said premises and buildings of said plaintiff fronting on said street, and also along and upon the west side of said street, adjoining said premises, and the buildings fronting thereon, belonging to said plaintiff, which said sidewalks constructed as aforesaid, were then and there of great height, to wit, of the

height of feet above the original and natural grade of said streets, so that the surface of said sidewalks extended up the walls of said buildings and above the public and private entrances thereof and above the floor of the first story of said buildings, a distance of, to wit, inches, by means whereof a free and convenient access of air, light and travel to said premises from said streets, and the free communication theretofore existing between said premises and said streets were then and there cut off and destroyed; that said premises were thereby rendered unfit for the uses to which they had been and were best adapted, and for which they were most valuable; that water flows from said walks unto said premises and into said buildings, thereby causing said premises to become unwholesome and unfit for habitation, and the basements under said buildings and foundation walls thereunder, became and are destroyed; that the construction of said walks as aforesaid, water will continue to flow from said walks unto said premises as aforesaid; that it became and is dangerous to pass to and from said buildings by the usual modes of ingress and egress therefrom; that the reasonable use and enjoyment of said property has been destroyed, and the market value of said property has been depreciated in the sum of dollars, and said premises have been rendered unfit for use as business buildings and the rental value thereof destroyed; that plaintiff has been deprived of the uses, rents, and profits of said property; and that said defendant has not taken any steps to ascertain the said damages to the plaintiff and said defendant has not compensated said plaintiff in any way for said damages so done to his said property, but refuses so to do: and so plaintiff says that he has been damaged as aforesaid in the sum of dollars, and therefore he sues.

b

For that whereas, on the day of, 19.., the plaintiff was possessed of and the owner of lot number (Describe the property) in the county of and state of Illinois, and has since that time, hitherto, remained possessed of and the owner of said real estate, and did at that time and has continuously, since, occupied the same as a place of residence and as her home. And at that time had a convenient, safe, and level grade outlet into street and street in said city, and safe and convenient access to and from her said house until the committing of the said several grievances herein mentioned, had a good and safe outlet for the water falling upon said premises and passing over the same. And whereas, the railway company are possessed of and operating certain railway tracks and right of way across street in said city near and adjacent to the premises of the plaintiff aforesaid, and the north and west line of plaintiff's said premises; and whereas, the said

defendant did on the day of, 19..., erect and maintain a certain overhead bridge over and above its said tracks on said street and across its said right of way and tracks there, it became and was the duty of the said defendant to so erect and maintain the approaches to said bridge as not to injure, impede, and inconvenience the access of the plaintiff from her residence aforesaid, to and from said and streets, and so as not to impede check or diminish the flow of water from off the premises of the plaintiff aforesaid and to furnish and place suitable and sufficient drains or culverts under and through said bridges to permit water falling upon or passing over the premises of the plaintiff aforesaid, to be carried away and off her premises; and it became and was the duty of the defendant to so erect said approaches as not to in any way damage or injure the market value of said premises or in any way to damage or injure her in the use of the same as a residence and home. And the plaintiff avers that the defendant disregarding its duty in the premises did on, to wit, the day of, 19..., unlawfully negligently, carelessly and recklessly, build and erect, and has since until now, unlawfully negligently, recklessly and carelessly maintained on said streets adjacent to the front of plaintiff's premises aforesaid, and the residence house thereon, a very high, narrow and steep approach made of dirt only and has placed therein no drains or culverts by means of which the water can run or be carried away; by means of which said approach so negligently, carelessly unlawfully and recklessly built and erected as aforesaid, the water which falls upon or passes over the plaintiff's premises aforesaid has been dammed up and remains on said premises, and is prevented from running or being carried away and off plaintiff's premises, causing said premises to become a lake or pond, greatly damaging and injuring its use and enjoyment by said plaintiff, and greatly diminishing its market value, to the damage, etc.¹⁹

(Virginia)

For this, to wit, that during the year 19..., the said plaintiff owned in fee simple, and occupied a home and lot, on the corner of street and avenue, in the town of, Virginia, that the dwelling house on the said lot was erected by the plaintiff many years ago, and was occupied by her, her husband and family. That she laid out a beautiful lawn on the north side of her house which faces on street, and on the side of her dwelling house which faces on avenue, and made and laid

¹⁹ Shrader v. Cleveland, Cincinnati, Chicago & St. L. Ry. Co., 242 Ill. 232.

out the same in conformity to the then natural and existing grades. That she planted the lawns in grass, shrubbery and shade trees, that she also laid out a back yard, wood lot and garden and built a carriage house and other out houses, the outlet to the same being on avenue, this avenue running north and south along the full length of her premises. And the plaintiff planted fruit and shade trees and berries and vines on said lot in conformity to the then existing grade, and also erected upon the said lot fences and cross fences, all of which improvements with the dwelling house are worth at least \$., and on these premises the plaintiff with her family had lived in peace and quiet for years, when the defendant during the year 19.., came upon avenue with shovels, picks, plows, carts, teams and laborers, etc., and dug down said avenue or street and dug down the grade of the same along her entire lot, so that the cut in said street at the east gate of the plaintiff's lot in her yard is about four feet and about the same depth below the entrance to the back yard and wood yard, making entrance to the lot very difficult, the lot unsightly and will result in the destruction of the trees and fences of the said plaintiff on the said street. That there is no way to give plaintiff an outlet to said avenue except by cutting down the east side of her lot, destroying her fruit and shade trees, her vines and shrubbery and her lawns, etc., and injuring her garden, so that the consequential damages to her lot is very great from the grading down of the said street. And that she has only a front entrance to her lot and no available entrance to her back yard and garden.

By means of which several premises the said plaintiff hath been and is greatly injured and damaged; by the deterioration of the value of her said lot, lying on the corner of street and avenue, at, Virginia, and also by the damage to her dwelling, out-houses, yard, lawn, shade trees, shrubbery, back yard, wood lot, fences, vineyard, garden, fruit, fruit trees and fruit vines, etc., standing and being on said lot. To the damage of the said plaintiff of \$.

1280 Collateral note, wrongful surrender, Narr. (Ill.)

For that whereas, heretofore, to wit, on the day of, 19.., to wit, at the county of aforesaid, the said plaintiff and said, in consideration of a loan of money then and there made by said bank to the said plaintiff, executed and delivered to the said bank a certain note in writing, commonly called a promissory note, dated the day of, whereby said plaintiff and said days after the date of said note, jointly and severally promised to pay to the order of the said bank, dollars, at the office of said bank, with interest at per cent per annum after

due until paid, in and upon which note the said was then and there a surety only, and the said plaintiff was then and there the principal maker; and the said plaintiff at the said time of the execution and delivery of said note to said bank, to wit, on the said day of, to wit, at the county of aforesaid, delivered to said bank and said bank then and there accepted from the said plaintiff, in the pledge and as collateral security for the said note so made by said plaintiff and said to said bank, a certain other promissory note in writing then owned and possessed by said plaintiff, dated the day of made by one, whereby said promised to pay to the order of, year after the date thereof, the sum of dollars, with interest at the rate of per cent per annum, which said note so made by said had before said delivery thereof to said bank been endorsed in blank, without recourse, by said, and delivered to said plaintiff, and was at the said time of the delivery thereof to said bank of great value, to wit, of the value of dollars. And the said plaintiff further avers, that upon the delivery of said note so made by said to the said bank as aforesaid, to wit, on said day of,, and at the county aforesaid, it became and was the duty of said bank to safely keep the same and to have the same ready to return to the said plaintiff upon the payment by said plaintiff of the said note made as aforesaid by said plaintiff and said to said bank; yet, the said bank and the said other defendants herein, well knowing the premises, contriving and intending to injure the said plaintiff in this behalf and to prevent the said plaintiff from having and repossessing himself of the said note made by as aforesaid, on, to wit, the day of, 19.., to wit, at the county of aforesaid, and before the maturity of the said note made as aforesaid by said plaintiff and said to said bank, and while said bank still held said note, so made by said, of and for said plaintiff in pledge as collateral security as aforesaid, did wrongfully take and surrender and deliver the said note, so made as aforesaid by said, to the said and did convert and dispose of the same to their own use; whereby the same became and is wholly lost to said plaintiff, and whereby the said plaintiff has been and is greatly injured, to wit, at the county aforesaid. To the damage, etc.²⁰

²⁰ Post v. Union National Bank,
159 Ill. 421, 426 (1896).

1281 Condemnation, abandonment, action

A petitioner in a condemnation suit is liable for damages resulting from a failure to elect to pay the judgment or to abandon the condemnation proceedings within a reasonable time of the rendition of the judgment. These damages accrue and are payable to the person who owns the property at the time the wrongful delay takes place.²¹

1282 Condemnation, abandonment, Narr. (Ill.)

For that whereas, on, to wit, the day of
....., 19.., the plaintiff was, to wit, in said county, the owner
of certain real estate, situated in said county, which was then
and there known and described as follows, to wit: (Insert
description of land); that said land was, at the time and place
aforesaid situated within the corporate limits of the city of
....., in said county; that said city of
had become prior to the day of
19.., and then was, to wit, in the county aforesaid, incorporated
under an Act of the general assembly of the state of Illinois,
entitled "An Act to provide for the incorporation of cities and
villages" in force July 1, 1872; that the common council of said
city of, had, prior to the day of
19.., passed an ordinance providing for the opening of an
alley from street to street, between
..... street, all of which streets were then and there
in said city of, which ordinance was, at the time
and place aforesaid, in full force and effect; and that said ordi-
nance provided that said alley should pass over the west
feet of the east of lot addition to
owned by the plaintiff as aforesaid.

And plaintiff avers that said city of, did, on
to wit, the day of, 19.., in pursu-
ance of said ordinance, file in the circuit court of
county, its petition praying that the just compensation to be
made for private property to be taken or damaged for the pur-
pose specified in said ordinance shall be ascertained by a jury;
but that the defendant, although it well knew that plaintiff was
the owner of said land, did not name him as a party thereto; that
the said petition was then and there an incumbrance upon said
west feet of said east half of said lot owned by
the plaintiff as aforesaid and also a damage to the remainder
of the east of said lot not intended to be taken for
said purpose; and that by means of the premises it then and
there became and was the duty of said defendant to prosecute

²¹ Winkelman v. Chicago, 213 Ill.
360, 363, 365 (1905).

said petition to a judgment with all promptness which was reasonably possible, so as to save the plaintiff harmless from all unnecessary damage accruing from the continuance of the incumbrance of the said petition, or otherwise in case the defendant should elect to abandon the purpose of opening said alley.

Yet the defendant although it (defendant herein) had the right to obtain a hearing of said petition within six months after the time the same was filed, utterly disregarded its duty in the premises and negligently and wrongfully failed for, to wit, over years to bring said petition to trial, although it had caused to be tried before the trial of the petition above mentioned over, to wit similar petitions filed in said court, commenced subsequently to the filing of said petition, and did not bring said petition to a trial until, to wit,, 19...

And the plaintiff avers that upon said trial a jury was empaneled and sworn to ascertain the compensation to be paid for land taken or damaged by the opening of said alley, and after hearing evidence, said jury on, to wit,, 19.., in the county aforesaid returned their verdict finding that compensation should be made to the owner of the west feet of the east of said lot of dollars, and that compensation should be made to the owner of the remainder of said east of lot not taken for damages thereto occasioned by the taking of said west feet of dollars; and said circuit court, on, to wit, the day of, 19.., to wit, in said county, rendered judgment upon said verdict, which judgment still remains in full force and effect.

And the plaintiff avers that said defendant did, on, to wit, the day of, 19.., in the county aforesaid, elect to abandon said improvement and has abandoned the same.

And the plaintiff avers that by reason of the pendency of said petition from the date of its filing until the time when said improvement was abandoned, as aforesaid, said east half of said lot became unsalable, and the sale thereof at its cash value prevented; of all which defendant then and there had notice.

And plaintiff avers that at the date of the filing of said petition said land was of the fair cash market value of dollars per front foot and said land was then and there feet wide in front, and that during the pendency of said petition there was a steady decline in the value of real estate in the city of, of which defendant then and there had notice; and the said land of this plaintiff shared in said decline, so that at the time of the abandonment by defendant of said improvement as aforesaid, it was, and still remains of the fair cash market value of, to wit, dollars per front foot, and

not more, against the loss to plaintiff occasioned by said decline, he might but for his being therefrom prevented by the pendency of said petition, have saved himself by sale of said land, of which the defendant then and there had notice. But the plaintiff avers that, by reason of the pendency of said petition and the abandonment thereof as above set forth, the plaintiff has sustained a loss of dollars on each front foot of said east of said lot, and that by means of the premises his private property has been damaged for a public use without just compensation.

And the plaintiff avers that by reason of the filing of said petition, he was obliged in order to meet the issues therein presented to and did employ counsel and obtain the attendance and the testimony of expert witnesses to testify to the value of said land and to the fact that the part thereof not proposed to be taken would be damaged by taking from its original width of feet, said west feet, and the plaintiff was also thereby obliged to and did obtain the services of a stenographer to take stenographic notes of the proceedings at, and the evidence given upon said trial, and produce a transcript of such notes; of all of which the defendant then and there had notice. And the plaintiff avers that the fair and reasonable value and customary charges of such counsel, witnesses, and stenographer for services and attendance upon such trial was then and there, to wit, dollars, which the plaintiff has paid.

And the plaintiff avers that by reason of the abandonment of said improvement the plaintiff has been deprived of the pecuniary benefits of said trial and said dollars has been thereby taken from him by defendant's action without just compensation.

Wherefore, etc.

1283 Collision wagon, Narr. (Md.)

For that the plaintiff at the time of the injuries complained of was a merchant dealing in; that the defendant was at the same time operating a system of street railway cars in the city of; that on the day of, 19.., at about o'clock in the noon a horse and wagon containing goods of said plaintiff and driven by plaintiff's servant while attempting to cross street at the intersection of street in said city, were, without fault or negligence on the part of said plaintiff or his servants, struck violently by a car of said defendant driven recklessly and at high rate of speed by one of its servants and that said horse and wagon were thereby badly injured and the plaintiff suffered grave loss to his goods and trade. And the plaintiff claims \$...... therefor.

1284 Conspiracy concerning local improvement, action

A contractor and local improvement board who enter into a conspiracy to construct an inferior improvement from the one specified in the contract and ordinance, are personally liable to a property owner who is specially injured by the carrying out of the conspiracy. This is so with reference to public officers, because they owe a duty, ministerial in its character, to the individual property owners along a public improvement to comply with, and enforce compliance with, the ordinance and contract for the purpose of benefiting and increasing the value of each owner's property, at least, to the extent of the assessment laid upon it; and this duty is different from the general duty the officers owe to the public generally.²²

1285 Conspiracy concerning local improvement, Narr. (Ill.)

For that whereas heretofore, and at the time of the committing by the defendants of the grievances hereinafter mentioned, the plaintiff was, and from thence hitherto has been and still is, the owner of a certain parcel of land situate in the village of in the county aforesaid, described as (Insert description of property); and the defendants, G and C, were, and each of them was, then and there acting as members of the board of trustees of said village and also acting as members of the board of local improvements of said village, and the defendant M was a contractor exercising and carrying on the business of building, and improving roads and pavements; and whereas, also, on, to wit, the day of, 1...., the president and board of trustees of said village, in pursuance of a resolution adopted by the board of local improvements of said village, passed an ordinance for the improvement, by special assessment, of a certain system of streets consisting of avenue and certain portions of street and the intersections thereof with other streets and alleys in said village, by grading, filling, curbing, guttering, macadamizing and otherwise improving said streets and portions thereof, in accordance with certain plans and specifications therein contained, in such manner that the roadway upon said system of streets should, when completed, be smooth, hard, solid and unyielding throughout; which said ordinance, plans and specifications are now here presented to the court and ready to be produced upon the trial hereof or as the court may direct. And the plaintiff avers that in pursuance of said ordinance, certain lands and lots along the line of said improve-

²² Gage v. Springer, 211 Ill. 200, 204 (1904).

ment which would be specially benefited by the construction of said improvement in accordance with the said ordinance, plans and specifications, including the said parcel of land so owned by the plaintiff, which the plaintiff avers would also have been specially benefited thereby, were assessed to pay the cost thereof, and a petition for the confirmation of said assessment was, on, to wit,, filed in the county court of said county, and was afterwards, on, to wit,, confirmed by said court; all of which will more fully and at large appear from the records and proceedings of said court in the matter of said petition, ready to be produced on the hearing hereof or as the court shall direct.

And the plaintiff avers that the amount so levied as special benefits against the said lands and lots, to pay for the construction of said improvement, was the sum of, to wit, \$....., and that the amount levied and assessed as special benefits against the said parcel of land so owned by the plaintiff, was the sum of, to wit, \$.....; and the plaintiff's said parcel of land was then and there of great value, to wit, \$.....

And the plaintiff further avers that the said ordinance for said improvement so passed by the president and board of trustees of said village, provided that the work upon said improvement should be done under the direction, inspection and supervision of the board of local improvements of said village; that the cost thereof should be paid for by special assessment in accordance with an Act of the general assembly of this state entitled, "An Act Concerning Local Improvements," approved, and all amendments thereto, and that of the amount of said assessment the sum of \$..... should be applied to the payment of the expenses attending the proceedings for making said improvement and the cost of making and collecting said assessment; that the aggregate amount levied for said improvement and each individual assessment so levied and assessed should be divided into ten instalments, the same to be due and payable, respectively, on the day of, in each year following the confirmation of said assessment until all should be paid, each instalment, except the first, to bear interest at the rate of per cent per annum from the date of such confirmation. That for the purpose of anticipating the collection of the second and succeeding instalments of said assessment, said ordinance provided that bonds should be issued, payable out of said instalments, bearing interest at the rate of per cent per annum, payable annually, and that said improvement should be so constructed that the various parts thereof should be joined and connected in such manner as to make the whole work uniform and complete and a connected system.

And the plaintiff further avers that after the passage of said ordinance, as aforesaid, and, on, to wit, the day of, 1...., the said G and C, who were then and there acting as

members of the board of local improvements of said village, did, in pursuance of the authority conferred upon said board of local improvements by said ordinance and the said Act of the general assembly, undertake the direction and supervision of the construction of said improvement, and said G and C, together with one F, who were then and there acting as the board of local improvements of said village, did then and there enter into a certain agreement in writing with the defendant, M, for the construction of said improvement for the contract price of, to wit, \$....., the same to be paid to said M in bonds and vouchers, payable out of the special assessments so levied as aforesaid, which said agreement in writing provided for the construction of said improvement in substantial compliance with the terms and provisions of said ordinance, and provided that all the work upon said improvement should be executed in the best and most workmanlike manner and no improper materials should be used, but that all materials of every kind should fully answer the specifications therefor; which said agreement, together with the specifications therein referred to and made a part thereof, are ready to be produced upon the hearing hereof or as the court shall direct.

And the plaintiff further avers that the said M, in pursuance of said agreement in writing, then and there undertook the construction of said improvement and did, then and there and thereafter, make and construct upon said system of streets so ordered by said ordinance to be improved, as aforesaid, a certain pretended pavement which was not made and constructed in accordance with the terms of said ordinance and said contract, but was different from and inferior in quality to, and cheaper in cost than the said improvement so provided by said ordinance; and the said G and C, acting at the time aforesaid as, and constituting a majority of, the said board of local improvements, and colluding and conspiring with the said M, and contriving and unjustly intending to injure the plaintiff and the plaintiff's said property, and conspiring and intending to injure the said owners of the property so specially assessed, as aforesaid, improperly, unlawfully, wantonly and maliciously permitted said M to construct said pavement in a manner different from and inferior to and cheaper in cost than the improvement so provided for by said ordinance, and acquiesced in, and encouraged the construction thereof as the same was constructed, and afterwards wantonly and maliciously and in bad faith accepted, in violation of their duty to the plaintiff, the said different and inferior and cheaper improvement as a compliance by said M with the terms of said ordinance and the provisions of said written agreement; and thereafter, to wit, on the day of, 1....., the said defendants, G and C, conspiring with the said M to injure the plaintiff and the plaintiff's property, and the owners so assessed for said improvement, as aforesaid, wantonly and maliciously and in

bad faith, caused to be issued to said M, bonds for the payment of the contract price of said improvement and largely in excess thereof, such excess amounting in the aggregate to a large sum of money, to wit, the sum of \$.....

And the plaintiff further avers that the roadway so by said ordinance ordered to be improved upon said system of streets, was not, nor was any portion thereof, when completed, smooth, hard, solid and unyielding throughout, but was rough and uneven, soft, muddy, yielding and incapable of sustaining the ordinary and usual traffic; that the cost of said improvement, as the same was constructed and accepted, was very much less than and not to exceed, to wit, per cent of the amount of the assessment so levied, as aforesaid; and the said variances from and disregard of the terms and provisions of said ordinance and contract were occasioned by a wilful, wanton and malicious disregard of the requirements of said ordinance and contract by the defendants and were the result of a combination and collusion among them for the purpose of injuring the plaintiff and others assessed to pay for said improvement, and for the purpose of wrongfully and unlawfully increasing, in favor of said M, the proportion of money over the expense of constructing said improvement, to the damage and in fraud of the rights of the plaintiff; all of which matters and things were, at the times of the making and doing thereof, respectively, well known to the defendants.

And by reason of the committing of the said several grievances by the defendants, the plaintiff has not received the benefit of the improvement for which the plaintiff's said land was assessed, and the pretended improvement as constructed and accepted is an injury to the plaintiff and a detriment to her said property, and the plaintiff's said property is greatly depreciated in value thereby. And the plaintiff was also then and there compelled to, and did lay out a large sum of money, to wit, the sum of \$....., so assessed against the plaintiff's said land, in order to prevent the sale thereof under and by virtue of the revenue laws of the state of Illinois; and also thereby the plaintiff's said property became and was and is encumbered and subject to a lien for the amount so assessed against it as aforesaid, with interest thereon, to wit, the sum of \$.....; and the plaintiff has otherwise been greatly thereby injured in her property and estate. And other wrongs the defendants to the plaintiff then and there did. To the damage, etc.

1286 Conspiracy in restraint of trade, action

Any person or combination of persons who directly or indirectly cause injury to a person's lawful business by their wilful interference therewith are liable for all damages sustained by

him.²³ All parties to a conspiracy to ruin the business of another are liable for all overt acts illegally done pursuant to the conspiracy and for a consequent loss, whether they were active participants or not.²⁴

1287 Conspiracy in restraint of trade, Narr. (Ill.)

For that whereas, for a long space of time, to wit, years next prior to the committing by the defendants of the several grievances hereinafter mentioned, the plaintiff was a manufacturer of and dealer in bricks, and was the owner and possessed of certain lands and buildings at, in the state of Illinois, which were in use by him as such manufacturer, which said lands and buildings were then and there fully adapted to and equipped for said business; and the plaintiff had then and there expended large sums of money, to wit, the sum of (\$.) dollars, in acquiring and equipping the said land and premises for the manufacture of bricks as aforesaid in his said business, and was then and there, to wit, during the said period of time, engaged in the manufacture of bricks, and in selling the same in the county of, and state of Illinois, and the sale of such bricks was then and there, to wit, during said period, almost exclusively in the county of aforesaid; and the plaintiff was then and there, to wit, during said period, in the receipt of large profits and gains from his said business, and especially from having a market for bricks in the said county of; and the said business was then and there, to wit, during the period aforesaid, of great value to the plaintiff, and would have so continued to be, except for the several grievances against him by the defendant committed, as hereinafter set forth.

And the said plaintiff avers that on the day and year first aforesaid, and thenceforth until the commencement of this suit, there was in the said county of a certain corporation organized and existing under the laws of the state of, known as C, one of the defendants herein, which said association has for a long space of time, to wit, from the date first aforesaid and since hitherto, comprised and had among its members a large proportion, to wit, two thirds of all the persons and firms who, during said space of time, have been engaged in the said county of in the business of constructing brick and mason work, and in purchasing and obtaining supplies of brick to be used in said county, which said membership of said corporation has, during the said space of time, comprised substantially all the responsible and reliable persons or firms engaged in said business of constructing brick

²³ Purington v. Hinchliff, 219 Ill. 159, 166 (1905).

²⁴ Purington v. Hinchliff, *supra*.

and mason work in said county, and in purchasing and obtaining supplies of brick to be used in said county.

And the plaintiff avers that for a long period, to wit, years prior to the day and year first aforesaid, the members of said association constructed a large portion, to wit, per cent of the brick and mason work in said county of, and during the said period the plaintiff made sales of substantially all of the brick of his manufacture, and all that could be manufactured at his aforesaid plant, to the members of said C, from which sales he derived large profits and gains, to wit, the sum of (\$.....) dollars annually, for a long space of time, to wit, prior to the date first aforesaid, and during said period of years.

And said plaintiff further avers that at the date first aforesaid, and thereafter, up to the time of the bringing of this suit, there was in said of a certain voluntary organization or association of individuals known as B of, which said association then and there comprised and had among its members a large proportion, to wit, per cent of the manufacturers of brick in said county, the members of which said association were manufacturers of and dealers in and sellers of brick in said county.

And the plaintiff avers that the defendant, D, was then and there, to wit, at the date aforesaid, and since hitherto has been, and still is, a member of, and the president of said C, and the defendants, P, W, A and L, were then and there, to wit, during said period, and still are, members of the said B, and engaged in the business of manufacturing and selling brick; and that there existed at the date first aforesaid, and since hitherto has existed, a certain organization, being a voluntary association of individuals, which association has been and still is known as the U No. of the I U, otherwise called and known and hereinafter designated as X, which said organization or association comprises and contains among its membership a large percentage, to wit, per cent of the competent brick layers of said county.

And the plaintiff further avers that while he, the said plaintiff, was lawfully and peacefully conducting his business as a manufacturer of and dealer in brick as aforesaid, to wit, at the date first aforesaid, and since hitherto, the said defendants, well knowing the premises, and wrongfully and unlawfully conspiring, combining, confederating and contriving to injure the said plaintiff in his aforesaid business, and to deprive him of the legitimate profits which he would otherwise have derived therefrom, wrongfully and corruptly conspired and agreed among themselves, and caused to be agreed by said C and the members thereof, that such members should not purchase, nor be permitted to purchase, any brick to be used by them, or any of them, from any person, firm or corporation except such as had subscribed to the rules and regulations of the said C, to

which said rules and regulations the said plaintiff had not then and there subscribed, and to which rules and regulations the said plaintiff was then and there under no obligation to subscribe; all which the said defendants then and there well knew.

And the plaintiff further in fact says that the said B wrongfully and corruptly took action, assuming to bind and pledge its members, and each of them, not to handle or lay any brick manufactured by any person who had not subscribed to the said rules and regulations of the said C, which said rules and regulations were then and there inimical to the legal rights of the said plaintiff in his business aforesaid, and were then and there calculated and intended to injure, prejudice and interfere with the plaintiff's said business, and wrongfully and unlawfully to deprive him of the legitimate gains and profits of his said business, and to destroy the said business of the said plaintiff, which said action or pledge was then and there, and since thereto has been accepted and acted upon by said members and by the said defendants, severally and respectively, to wit, at the county aforesaid.

And the said plaintiff further avers that after the making of the said supposed agreements and pretended pledges as aforesaid, and with the unlawful and corrupt purpose of injuring, prejudicing and interfering with the plaintiff's said business in that behalf, and of preventing and precluding him from conducting said business in said county of, with any advantage or profit whatever, the said defendants, to wit, on the day and year first aforesaid, and at divers other times, to wit, at said county of, procured sundry persons to go to the customers of the plaintiff, and to attend at the place and places where bricks of the plaintiff were bought to be used in the construction of sundry buildings in said county of, and then and there wrongfully and corruptly represented to the said customers and to the workmen who had then and there been engaged or were employed to lay and work with the bricks of the said plaintiff, that if they, the said customers, or they, the said workmen, should purchase or use the bricks manufactured by the plaintiff, such customers, and such workmen would be prevented and hindered from completing or proceeding with any building or structure in said county upon which it was proposed to use the bricks of the plaintiff; and at divers times and places in said county, from the date first aforesaid, and since hitherto, said defendants, in furtherance of their unlawful conspiracy and combination in that behalf, have by divers wrongful threats, including the imposition of fines upon persons dealing in or using the bricks of said plaintiff in said county, in fact prevented sundry customers of the plaintiff from purchasing bricks from the plaintiff, and from completing with such bricks the contracts in which such brick would have been used, and have also wrongfully and unlawfully prevented workmen upon sundry buildings and struc-

tures in said county from using or laying the bricks of the plaintiff; and the defendants then and there made divers wrongful, unlawful and malicious threats in the premises, and caused such wrongful, unlawful and malicious threats to become generally known among the persons who would otherwise have been customers of said plaintiff for bricks, so that many of such customers have been wrongfully deterred from buying or using the bricks of the plaintiff as they would then and there have done but for the wrongful, unlawful and malicious conduct of the defendants as aforesaid.

And that by means of the several supposed agreements hereinbefore mentioned, and of the aforesaid wrongful, unlawful and malicious acts and interferences of the defendants, and the aforesaid unlawful conspiracy in that behalf, the plaintiff has been and still is entirely and wholly deprived of the benefit of sales of bricks in said county, which, but for the aforesaid wrongful, unlawful and malicious agreements and acts of the defendants, he would have had and enjoyed; that the plaintiff has been and still is unable to sell or dispose of bricks in said county, as he might and otherwise would have been able to do, and has lost and been deprived of divers large gains and profits which he might and would have acquired from such sales in the county aforesaid; and that the business of the plaintiff has been and is greatly damaged, injured and rendered much less profitable than the same would otherwise have been, and the value of his said lands and buildings used as aforesaid in the manufacture of bricks has been greatly depreciated and injured.

And other wrongs the said defendants to the said plaintiff then and there did. To the damage, etc.

1288 Conspiracy to alienate wife's affections, Narr. (Mich.)

For cause of action said plaintiff avers that she was married to said defendant,, on or about, 19., and that he is a son of the defendants, and; that prior to said marriage, said plaintiff lived for a long period of time with her parents in the city of, and that shortly after said marriage she took up her abode with her said husband, and kept house at, Michigan, where her husband was engaged in the general mercantile business with the defendant,, under the firm name of, and in which business her said husband owned and held a large interest, to wit, \$. and upwards.

That her married life was happy until said defendants, and, undertook to intermeddle in the relations existing between herself and her husband, and to dominate and control his treatment of her.

That having acquired a dislike to the plaintiff, the said and undertook to bring about a separation of the plaintiff and her husband, and to accomplish

which purpose alienated her husband's affections, and induced him to commence and prosecute a divorce suit against the plaintiff in the circuit court for the county of, which occasioned the plaintiff much mental anguish and sufferings, and loss of support of her husband, to recover which she sued the said defendants, and, in this court.

That while the said suit and the divorce suit was pending, the said defendants, and, made a settlement with the plaintiff of the loss involved in said suit, and as part consideration therefor they agreed to and did deed to her certain real estate in the city of of the value of, to wit, \$....., and promised and assured plaintiff that if she would forgive her husband for his alleged misconduct in the premises and would again live and cohabit with him, that the said defendants, and, would in no manner intermeddle in their marriage relations, or attempt to influence her husband to her detriment or disadvantage, and that her said husband should and would close out his interest in the business at and remove to and reside at, and remove his household effects thereto, and there live and keep house with the plaintiff, and that her said husband would engage in business with the plaintiff's father, in which he would be enabled to earn more than sufficient to meet the wants and requirements of said plaintiff and her husband.

That believing that said defendants, and, would in good faith refrain from molesting said plaintiff, and from interfering or intermeddling with her or her husband's affairs, and from influencing her husband to her detriment, and would not thereafter seek to alienate her husband's affection that she would again regain by living and cohabiting with him, said plaintiff consented to and did discontinue her suit against the defendants, and aforesaid, without costs, and released them from her claims involved in said suit, and consented to the withdrawal of the divorce suit by her husband without costs, and again lived and cohabited with her husband, and together they planned the establishment of their home at, and rejoiced in the outlook for a bright and happy future, and plaintiff again regained and was possessed of the affection of her husband, and but for the committing of the grievances by defendants, hereinafter alleged, would be still living happily with her said husband in their home at the city of

Plaintiff further avers that upon said adjustment, her said husband provided her with temporary moneys for her support, together with his assurance that she would be properly and regularly cared for by him, and soon thereafter went to with the intention and purpose of closing out his interest in the business of said, and removing

the plaintiff's household furniture and effects to, which were at a former home in, and shortly join her there and begin housekeeping.

Plaintiff further avers that the defendants, and, were very much wrought up at their being obliged to transfer to plaintiff in the settlement aforesaid, the real estate hereinbefore mentioned, and on frequent occasions thereafter importuned her to re-deed it to them, and then and there in various ways and by divers pretexts hampered her in the use and occupation thereof and in obtaining the rents accruing therefrom, and well knowing that plaintiff would not be moved by their importunities to comply with their wishes, they became very much embittered towards her, and determined to coerce her into re-transferring the said property to them, or either of them, and, if necessary, in the accomplishment of such purpose to estrange her from her husband, and deprive her of her home, her husband's affection, society and support.

Thereupon said defendants, and, conniving with and acting in concert with the defendant,, who was a close friend and adviser of theirs, determined to force the plaintiff to re-deed the property, and in the accomplishment of which purpose, said defendants conspired to bring about a separation between plaintiff and her husband, and to alienate his affection from her, and to induce him to withhold from her his society, a home and support.

That said defendants, in pursuance of such plan and scheme, acting jointly and severally, well knowing that the said defendants, and, dominated and controlled her husband's mind and will, and could easily influence his actions in the premises, on, to wit, the day of, 19.., and upon divers days and times between that date and the time of the commencement of this action at, to wit, the city of and various places, jointly and severally, wrongfully and wickedly carried on a secret correspondence with her said husband, and held various clandestine meetings with him, and by means of false reports of and concerning the plaintiff, communicated by them, or some of them, and by various other arts and devices, did wrongfully and wickedly alienate and destroy her husband's affections for her, which she had heretofore gained and was possessed of, and then and there induced and persuaded him to refuse to longer give her his affection, comfort, fellowship, assistance or support, and poisoned his mind against plaintiff, caused and procured her husband to fail and neglect to furnish her with the means of support, well knowing that she was at without means of support, and that it was her husband's intention to send her moneys weekly therefor, and caused and induced her husband to refrain from writing to her, or answer her letters to him, and from furnishing her with means to go to, in order that she might visit her husband and use her wifely

influence to awaken him to an appreciation of his duties and obligations in the premises.

That in order to more effectively carry out their said plans and to completely dominate and influence her husband in his conduct towards plaintiff, the said defendants, and, gave up their residence in, where they had lived for a great many years, only making occasional trips to, removed to and established their residence at aforesaid, and have since continued and still reside there.

That in further pursuance of said plans and schemes, and in order that the plaintiff would be deprived of her support, they, said and, have caused and procured plaintiff's husband to make fictitious transfers of his interest in said business and certain real estate which was situated in the city of and elsewhere, and of which he was heretofore the owner, to divers persons unknown to plaintiff, and caused a report to be circulated and published at and aforesaid that her said husband had no longer any interest in the business, and was without means, and then and there persuaded her husband to withhold all financial support and assistance to the plaintiff, thereby subjecting her to much humiliation, shame and disgrace, and causing her to deny herself of the comfort she had enjoyed, and would have enjoyed in the society, home, support and protection of her husband, but for the misconduct and wrongful acts of said defendants in the premises.

Plaintiff further avers that on or about the day of, 19.., believing that if she went in person to, she might by her wifely influence convince her husband of the great wrong and injustice he was doing to her in allowing himself to be influenced, dominated and directed by his said parents, and induce him to come to with her to live, and in furtherance of such purposes to assist her in removing the furniture and effects, with which their former home at was furnished, and, accompanied by her father, she went to, for the expense of which trip she was obliged to borrow the money, and saw her husband, and entreated him to go and live with her at, and get away from the domination and influence of his parents as aforesaid, and where they would be happy and enjoy their married life.

Plaintiff further avers that said defendants, and, had so completely alienated her husband's affection and regard for her, that he would not give ear to her entreaties, and refused to go or live with her, or assist her in sending her furniture and effects to, or provide her with maintenance and support; and finding that her husband was still under the domination and control of said defendants, and would not be influenced by her or comply with her

wishes, she prepared to pack and ship her household furniture and effects to, and upon investigation found that in furtherance of said plans hereinbefore mentioned, the said defendants, and, had induced her husband, without her knowledge or consent, to sell and dispose of a large and valuable portion of plaintiff's household furniture and effects, and to secrete others and withhold them from her; and that in further pursuance of said plans and purposes, in order to bring plaintiff into disrepute in the community at, among her friends and acquaintances, where she had always enjoyed a good reputation for honesty, integrity and womanly conduct, the defendant,, pursued plaintiff upon the public street at, and without cause or provocation, in the presence of a number of good and worthy people living at, in a loud tone of voice, called plaintiff a robber and thief, and other vile names, and publicly threatened plaintiff that unless she would give back the property which she had stolen (meaning the real estate which defendants, and, had deeded her), she would make plaintiff's life miserable, and on another occasion on the same day, at,, said defendant informed plaintiff that she would not permit her son to live with such a wife who had robbed them (meaning her and her husband) of their property, and that she would do all the harm and mischief she could; all of which plaintiff avers was in furtherance of the plans and schemes of the defendants aforesaid; and then and there and in other ways, and on other occasions, said defendant,, in pursuance of said plans and schemes, by subtle pretexts and in divers ways, subjected plaintiff to much humiliation, public scandal and disgrace in the community at; and in consequence of said defendants' conduct in the premises, plaintiff was obliged to return to without her husband and a considerable portion of the household furniture and effects, and without the home he was to provide for her, and be without his support, society and affection, and has by the acts and misconduct of said defendants, jointly and severally, lost the affection of her husband, and been deprived of a home, and its comforts, and his support and financial assistance and his society and protection, and has suffered much shame, humiliation and disgrace.

Plaintiff further avers that it is the purpose and intention of said defendants, and, in furtherance of said plans and purposes, to continue to keep the said plaintiff and her husband apart and to continue to deprive her of her home, society, affection, support and protection of said husband, and to continue to harass and annoy plaintiff, and to scandalize her in the community of, and elsewhere, and to bring her into disrepute among her friends, relations, neighbors and others, whereby she has suf-

ferred and still suffers great damage; wherefore because of the grievances herein set forth she claims damages in the sum of, to wit, \$.....

1289 Dishonoring check, Narr. (D. C.)

For that heretofore, to wit, at the time of the happening of the cause of action hereinafter set forth, the defendant corporation was engaged in doing a general banking business in the city of, District of Columbia. That the plaintiff was engaged in business as proprietor and owner of a, in the city of, District of Columbia, and as in and was and had been for a long time prior thereto a depositor in said defendant corporation bank, having on deposit with said defendant corporation from time to time divers large sums of money, and at the time of the happening of the grievance herein mentioned, a sum in excess of dollars. That it therefore became the duty of said defendant corporation to honor any and all checks of the plaintiff out of any cash balance payable to the plaintiff that might be in its hands, and to pay the same when a written order was drawn against the said money on deposit and presented for payment in due course of business. That on the plaintiff gave a check or order on defendant corporation, in writing, for the sum of dollars to, which check or order was presented for payment in due and usual course of business at the banking house of the defendant corporation on to wit, during usual business hours. That at the time said check or order was presented for payment and payment demanded, the plaintiff had sufficient and ample funds deposited in said bank to the credit of the plaintiff to pay said check or order, and it was then and there the duty of said defendant corporation to honor said check or order. Yet the defendant, well knowing the premises, did wilfully, wrongfully and unlawfully refuse to pay said check or order and dishonored the same and returned the same to the said payee with the statement that there were not sufficient funds to pay said check or order, said statement being made in the presence of a number of persons who heard the said statement, and it was believed by those who heard said remark that the plaintiff had drawn a check or order when he did not have sufficient funds on deposit in said bank to pay the same. That in consequence of the wrongful, wilful and unlawful acts of the said defendant corporation, the plaintiff was greatly injured in his credit and reputation, and that by reason of the premises the plaintiff has sustained damages in the sum of dollars. Wherefore, etc.

1290 Drainage inadequate, action

An action on the case will lie against drainage commissioners for their failure or neglect to furnish adequate drainage by a plan which is practical.²⁵

1291 Drainage inadequate, Narr. (Ill.)

For that whereas the plaintiff, heretofore, and at the time of the committing of the grievances hereinafter mentioned, was and from thence hitherto has been, and still is, lawfully possessed of the following described real estate, to wit: (Set forth description of same) in said county, Illinois, with the appurtenances, which said lands and premises the plaintiff before, and at the time, used and enjoyed, and of right ought to have used and enjoyed, and still of right ought to use and enjoy, to wit, in said county; that the lands of the plaintiff aforesaid heretofore, and at the time of the committing of the grievances hereinafter mentioned, were, and from thence hitherto have been a part and portion of the lands contained in and composing drainage district No., counties, a certain drainage district located and being in the southern portion of said county and in the county of next adjoining, and which said drainage district No., counties, was long prior to the committing of the grievances hereinafter mentioned, organized, adopted and maintained for the purpose of furnishing and insuring adequate and complete drainage for the lands located therein, including lands of plaintiff, and which said drainage district No., counties, and the benefits accruing therefrom to the lands of the plaintiff, the plaintiff, before and at the time, used and enjoyed, and of right ought to have used and enjoyed, and still of right ought to use and enjoy, to wit, in said county; that the said defendants, heretofore and prior to the committing of the grievances hereinafter named and mentioned, were, on, to wit, the day of, 19.., duly appointed by the county court of said county, commissioners in and for said drainage district No., counties, duly qualified and, from thence hitherto, and still are, acting as such commissioners, as is more fully shown by the records of said county court ready to be produced on the hearing of this cause; that the said defendants, heretofore, and at the time of the committing of the grievances hereinafter mentioned, were and from thence hitherto, have been and still are by virtue of the law in such case made and pro-

²⁵ Binder v. Langhorst, 234 Ill. 583, 586 (1908); Sec. 50, Levee act (Ill.).

vided, invested and clothed with full power and authority to alter, change, repair, regulate and maintain said drainage district No., counties, and the drains and ditches contained therein, in such manner and to such extent as will give and afford all the lands embraced and contained in said drainage district, full, adequate and complete drainage, including the lands of the plaintiff, which said rights and benefits of drainage so accruing to the lands of the plaintiff, the plaintiff before and at the time used and enjoyed, and of right ought to have used and enjoyed, and still of right ought to use and enjoy, to wit, in said county; that, heretofore and at the time of the committing of the grievances hereinafter mentioned, and from thence hitherto, and at the time of the bringing of this suit, by virtue of the statute above mentioned and by virtue of their said office as such drainage commissioners, it was the duty of said defendants, and each of them, to so alter, change, repair, regulate and maintain said drainage district No., counties, and the drains and systems of drainage contained therein, in such manner and to such extent as to give and afford all the lands embraced and contained within said district full, adequate and complete drainage, including the lands of the plaintiff, which said rights and benefits of drainage so accruing to the lands of the plaintiff, the plaintiff before and at the time used and enjoyed, and of right ought to use and enjoy, to wit, in said county; and that, heretofore and at the time of the committing of the grievances hereinafter mentioned, and from thence hitherto, and at the time of the bringing of this suit, the laws of the state of Illinois, in such case made and provided, made and constituted the said defendants liable and responsible for all loss and damages accruing to the plaintiff on account of the refusal, failure or neglect of said defendants to make such alterations, changes, repairs and regulations in said drainage district No., counties, and the drains and ditches therein, as may be necessary to afford ample and complete drainage for all the lands contained in said drainage district.

Nevertheless, the said defendants, acting at the time aforesaid, and long before and hitherto have acted, and are still acting as such commissioners of drainage district No., counties, as aforesaid, having full power and authority to alter, change, repair, regulate and maintain said drainage district No., counties, and the drains and ditches contained therein, contrary to the law as aforesaid, contriving and unjustly intending to injure the plaintiff in the possession, use, occupation and enjoyment of his said lands and premises, and to render the same incommodious and unfit for tillage and of little or no use or value to the plaintiff, and also to hinder same from becoming commodious and fit for tillage and of use and value to the plaintiff while the plaintiff was so possessed thereof and so used and enjoyed the same.

on, to wit, the day of, 19.., in said county, wrongfully and unjustly and unlawfully, failed, refused and neglected to alter, change, repair, regulate or maintain said drainage district No., counties, or the drains or ditches contained therein, and on divers times and occasions thereafter have also failed, refused and neglected to alter, change, repair, regulate or maintain said drainage district No., counties, so as to give and afford the plaintiff any adequate or sufficient drainage for his said lands in said drainage district, contrary to the law in such case made and provided; and said commissioners wrongfully and unjustly built thereupon, made and erected and permitted to be made and erected thereupon, certain grades, ditches, embankments, culverts and bridges, near to the lands and premises of the plaintiff, in so careless, negligent and improper manner, and have kept and continued said grades, ditches, embankments, culverts and bridges for a long space of time, to wit, from thence hitherto, that by reason of the aforesaid wrongful and unjust and unlawful actions of the said defendants, afterwards, to wit, on the day and year aforesaid and on divers other times thereafter, and before the commencement of this suit, divers large quantities of rain water and surface water and standing water remained standing upon said land, and ran and flowed from said ditches through said culverts and bridges and along said grade, and backed up by said bridges and other wrongful obstructions in said ditch, ran and flowed down to, upon, against and unto the lands of the said plaintiff, regardless of the diligent efforts of the plaintiff to remove and prevent the same, and flooded the crops, fences, soil and other parts of the plaintiff's lands, and thereby greatly damaged the said lands and premises of the said plaintiff, and the said crops, fences, soil and other parts thereof, and by reason thereof the said land and premises of the said plaintiff became and were, and are damaged, wet, swampy and unfit for use, occupation, cultivation and tillage. And also by reason of the premises, the rain water, surface water and standing water aforesaid ran and flowed in different directions or channels and with greater force and increased velocity and impetuosity than it of right ought to have and otherwise would have done, into, upon and against the lands and premises of the plaintiff, and the crops, fences, soil and other parts thereof were damaged and destroyed on account thereof. To the damage, etc.

1292 Drainage unsanitary, Narr. (Miss.)

That the said, for the purpose of conveying away the surface drain and water from its streets and elsewhere, has constructed a number of open ditches in different portions of said city; that one of said ditches has been dug by defendant on the side of street, and

continues southward to street, thence on the side of street for about feet, where it crosses said street to the side; and thence down the side of to street and thence on the side of street in a southward course.

That said ditch is about feet deep and from to wide, and is kept open without covering or lining; that the bottom of said ditch is uneven and broken; that in many places there are holes washed out in the bottom, so that the contents emptying into said ditch are greatly obstructed in passing through said sewer or ditch.

That said ditch or sewer was dug by defendant for the sole purpose of draining off of the surface water that falls in times of rain, and that it is the duty of the defendant to see that the same is used for no other purpose, and to keep the ditch in a reasonably sanitary condition, so that private property abutting on the streets traversed by said ditch will not be injured by overflow or accumulation of filth.

That plaintiff is the owner of (Set forth legal description of property), the same being a lot fronting on and streets and in the survey of said city of, and has houses located thereon, one fronting on and one on streets. The first was built to be occupied by the plaintiff as a residence for himself and family, the other for a tenant; and that the said ditch runs in front of both of said houses and within a few feet of the front porches of each.

Plaintiff avers, that notwithstanding the fact that said ditch was dug by defendant for the purpose of surface drainage alone, said defendant has permitted the use of it for the deposit of all kinds of filth and sewerage and that this use has continued for years; that defendant negligently permits the use of said ditch for emptying therein all manner of slop and filth; that within hundred feet of the plaintiff's said property there is a story hotel, a boarding house, a barber shop, a drug store, bank and a dental office, all emptying their slops and sewerage into said ditch by means of pipes running from said places and emptying directly into said ditch; that all of the slop from the kitchen, from the wash basins, bath tubs and of said hotel are emptied into said ditch; that the story of said hotel is used as a lodge hall, and that different lodges use it as a regular monthly meeting place, and a urinal is attached to said lodge hall and used by the members during their meetings, and at certain times during these meetings there is a steady flow of urine into said ditch and within a few feet of plaintiff's said property. That all the slop and waste water from said barber shop is conveyed directly into said ditch; that said drug store discharges all the foul and noxious water

and gases resulting from the washing of bottles and compounding of prescriptions, and from a large soda fount directly into said ditch; that all the foul smelling water and excrement from said dental office and bank, and all slops from the kitchen sink of said boarding house also run directly into said ditch or open sewer.

Plaintiff further avers that all of the above mentioned foul smelling and noxious matter flows into said ditch only a few feet of plaintiff's said property, and makes its way slowly down the said ditch next to said property; that in dry weather it frequently puddles and stands in holes and low places in the bottom of said ditch just opposite said property, and always gives off such a stench that it renders said property unfit for habitation; that during the spring and summer months, and especially in dry weather, there is such a foul, putrid odor and stench arising from said ditch because of said filth, slops and excrement permitted by the defendant to flow therein that it is impossible for persons to sit on the front porches of said houses, and that if the windows or doors of the rooms be left open at night, a person cannot sleep in the rooms without being constantly disturbed by said stench.

Plaintiff avers further that he tried to live in said residence with his family some years ago, and during the whole time he occupied the same he and his family were constantly annoyed by said stench; that it was not only unpleasant and disagreeable, but members of his family were almost constantly sick as a result of said unsanitary condition of said ditch; that upon the advice of his physician he moved his family away from said premises; and that he has been advised by his physician that it will not be safe to return to the place so long as said ditch remains in the said condition.

Plaintiff further avers that because of said unsanitary condition of said ditch, he has been unable to rent said property for the past years except for a short while at a time; that tenants will not rent the property because of the disagreeable scent arising from said ditch; that a reasonable rental value of said property for the past years would be dollars; and that plaintiff has lost that sum because of the unsanitary condition of said ditch.

Plaintiff further avers that said property has been greatly reduced in value, in fact, so much so, that it is practically worthless so long as said ditch remains in its present condition.

Plaintiff further avers that said ditch has been so used by said parties for the past years or longer, and that said unsanitary condition and said stench and disagreeable odor was fully known to the defendant; that said parties used said ditch for the purposes aforesaid with the full knowledge and consent of the defendant; and that the plaintiff often requested said defendant either to place tiling in said ditch or to stop the use of it by said parties for the deposit and dis-

charge of said slop, filth and excrement; but that the defendant has wholly failed to do either and has continued to permit the use of said ditch for said purposes; all to the plaintiff's damage in the sum of dollars. Wherefore, etc.

1293 Excessive levy, Narr. (Ill.)

For that whereas, on, to wit, the day of, 19.., said plaintiff was indebted to the defendant on promissory notes in the sum of dollars, said notes having been originally given for about the sum of dollars, on which the plaintiff was then and there entitled to a credit in the sum of dollars; and the defendant, well knowing the premises, wilfully and maliciously, and for the purpose of oppressing and wronging the plaintiff and injuring him in his credit, but by virtue of the power of attorney attached to said notes, procured a judgment in the court of the county of, and state aforesaid, against the plaintiff upon said notes, in the sum of dollars, without notice to the plaintiff; and then and there caused execution to be issued on said judgment, and placed the said execution in the hands of the sheriff of said county. And further, in pursuance of said purpose to wrong and oppress the plaintiff, and to injure him in his aforesaid standing and credit, the defendant wilfully and maliciously directed and caused the sheriff aforesaid to levy said execution upon all and singular of the goods and chattels of the plaintiff of the value, to wit, dollars, and wrongfully and maliciously directed the sheriff to take and hold said goods and chattels, and all of the same, by virtue of said levy and execution; and then and there caused the said sheriff to hold all of said goods and chattels for a long time, to wit, for the space of months next thereafter; by reason of which said levy the plaintiff was unable to have or use said goods and chattels, and was thereby greatly damaged in his credit and financial standing, and was then and there put to great expense, to wit, the sum of dollars, in setting aside said judgment and in defending said suit.

Plaintiff further avers that the said judgment for dollars in said court was set aside and this plaintiff was permitted to make his defense of payment of all that was due on said notes, excepting dollars, and that said suit was fully terminated before the commencement of this action.

Plaintiff further avers that he was also then and there thereby greatly hindered and prevented from transacting his ordinary affairs. To the damage, etc.

1294 Explosion of powder magazine, Narr. (Ill.)

For that whereas, on, to wit, the day of, 19.., in the county of aforesaid, the plaintiff was

the owner of and possessed of a certain lot of household furniture (Describe furniture) then located and being on the following described premises, to wit (Describe property), situate in the said county of; that he was also the owner of and possessed of a certain blacksmith shop then located and being upon the certain lot or parcel of ground next west and adjoining the premises above described, and the blacksmith tools therein contained; and that he was also the owner of and possessed of a certain other building, to wit, a certain frame dwelling located and being on the following described premises, to wit (Describe property), in the in said county.*

And the said defendant, on the day aforesaid, in the county aforesaid, was possessed of the following described property, to wit (Describe property), situated in the in the said county.

And it then and there became and was the duty of the defendant to so use, occupy and conduct the premises so possessed by it as aforesaid so as not to endanger or jeopardize the buildings and property of the plaintiff hereinbefore described, and not to store upon its said lot or parcel of ground any dangerous or explosive substance or compound whereby the property of the plaintiff might be destroyed by reason of the premature or accidental explosion of such explosive substance or compound.

Yet the defendant, not regarding its duty in that behalf, on, to wit, the day aforesaid, in the county aforesaid, kept and maintained on and upon the premises of the defendant hereinbefore described, a certain magazine of gunpowder, dynamite, gun cotton and other dangerous and explosive compounds; and plaintiff avers that the defendant then and there had stored in the said magazine upon the said premises a large amount of gunpowder, dynamite and gun cotton, said gunpowder, dynamite and gun cotton then and there being highly explosive and dangerous substances and compounds.

And plaintiff further avers that, on, to wit, the day aforesaid, in the county aforesaid, the said gunpowder, dynamite and gun cotton and other explosives, then and there kept in said magazine by the defendant, exploded, and by means of such explosion the material of which said magazine was constructed was then and there driven with great force and violence upon and against the property of the plaintiff hereinbefore described, and a concussion of the air of great force and violence was then and there caused by said explosion.

2. (Consider first count to star, as here repeated, the same as if set out in words and figures.)

And then and there was in full force and effect in the said a certain ordinance known as section of chapter of the revised ordinances of the of, which said section was and is as follows, to wit: (Set forth ordinance).

And then and there, by reason of and in accordance with the ordinance aforesaid, it became and was the duty of the defendant not to erect or maintain any powder magazine or place used for storing gunpowder or other explosive material on any lot, the size or area of which was such that the boundaries thereof were less than twenty rods distant from the walls of any such magazine or place.

Yet the defendant, not regarding its duty in that behalf, on, to wit, the day and year aforesaid, kept and maintained a powder magazine or place for storing gunpowder or other explosive material within the of aforesaid, which said powder magazine was located on the following described premises, to wit (Describe premises), the size or area of which was such that the boundaries thereof were less than twenty rods distant from the walls of the said powder magazine or place of storing gunpowder or other explosives, to wit, on the day and year aforesaid, contrary to the provisions of the ordinance aforesaid.

And the defendant then and there had and kept in said magazine large quantities of gunpowder, dynamite and gun cotton, said gunpowder, dynamite and gun cotton being then and there explosive materials.

And the said plaintiff further avers that, on, to wit, the day aforesaid, in the county aforesaid, said powder magazine was then and there struck by lightning, by means whereof said explosive materials then and there kept in said magazine by the defendant exploded, and by means of such explosion the material of which said magazine was constructed was then and there driven with great force and violence upon and against the property of the plaintiff hereinbefore described; and a concussion of the air of great force and violence was then and there caused by said explosion.

And the said horse of the plaintiff was then and there struck with a large stone then and there driven with great force and violence by reason of such explosion, and was then and there greatly bruised and wounded, from the effects of which wounds and bruises the said horse of the plaintiff afterward, to wit, in one day, died.

And the following property of the plaintiff was hit by rocks and stones propelled with great force and violence by means of such explosion, and was wrecked and torn by means of the concussion of the air then and there caused by said explosion, and was totally destroyed and lost, and was of great value, to wit, household furniture of the value of dollars; one horse of the value of dollars; one blacksmith shop of the value of dollars; blacksmith tools of the value of dollars.

And the plaintiff by means of such explosion sustained great damage to said buggy, wagon and sleigh of the plaintiff, and was obliged to and did lay out and expend in and about repair-

ing the same, the sum of dollars; that the building of the plaintiff so as aforesaid located and being upon the said lots in said (Describe property) was then and there by reason of said explosion and the concussion of the atmosphere caused thereby, greatly torn, wrecked and damaged, and plaintiff was obliged to and did then and there lay out and expend in and about repairing the said building, the sum of dollars.

And other damage was then and there sustained by the said plaintiff by reason of the premises, to the extent of dollars, by means whereof the plaintiff has sustained damage to the sum of dollars.²⁶

1295 False return, Narr. (Ill.)

For that whereas, the defendant.. on, to wit, the day of, 19.., was sheriff of the county aforesaid, and on that day the plaintiff.. delivered to him a certain writ of *feri facias* or execution issued out of and under the seal of the court of county, state of Illinois, duly attested by the clerk thereof and dated said day of, 19.., directed to the sheriff of said county, commanding him that of the lands and tenements, goods and chattels of C, trading as, in his county, he should cause to be made the sum of dollars, which plaintiff.. then lately in the court of county, at a term thereof begun and held at the city of, in said county on the Monday of, 19.., had recovered against the said defendant therein named C, and which by the said court was adjudged to the said plaintiff.. for ..he.... damages; and also the further sum of dollars which was adjudged to the plaintiff.. for ..h.... costs and charges in that behalf expended, whereof the defendant therein, C, was convicted, as appears by the record of said court, and that he should have those moneys ready to render to the plaintiff.. for ..h.... damages and costs aforesaid and should make return of the said writ with an endorsement thereon in what manner he should have executed the same within days from the date thereof.

Plaintiff.. further aver.. that at the time said execution was delivered by the plaintiff.. to the defendant as such sheriff of county aforesaid, said defendant had in his possession as such sheriff goods and chattels of the said C, in said writ of *feri facias* or execution named as defendant, of the value of, to wit, dollars; that the said defendant, B, pretended to then and there hold said goods and chat-

²⁶ Laffin & Rand Powder Co. v. Tearney, 131 Ill. 322 (1890).

tels of the said C under certain executions from the
 and courts of county,,
 in favor of, as follows: (Give list of executions).
 Also under and by virtue of an attachment writ from the
 court of county, state of Illinois, in
 favor of and against C for the sum of
 dollars, all of which said writs came to the hands of said sheriff
 on the day of, 19..; but plaintiff..
 aver.. the fact to be that at the time plaintiff..' said writ of
feri facias was delivered to the defendant, the defendant, as
 such sheriff, held said goods and chattels under and by virtue
 of only said attachment writ and by agreement between said
 plaintiff.. in execution
 and the defendant in execution, C, that after receiving and levy-
 ing the same the defendant, as such sheriff, advertise to sell
 said goods pursuant to law on the day of,
 19..; that by agreement between said plaintiff.. and defendant
 in said executions and said sheriff, said sale was continued from
 that date until the day of, 19.., the
 same was again continued by agreement as aforesaid between
 the said parties until the day of,
 19.., and that at the time of the delivery of plaintiff.. said exe-
 cution to said defendant as such sheriff, he held the said goods
 and chattels under and by virtue of said attachment writ and
 said agreement between the plaintiff.. and defendant in said
 executions respectively, and not under and by virtue of said
 executions or any or either of them, and that the same were
 then and there not liens upon the property of said defendant in
 execution, C, as against the plaintiff..

Plaintiff.. further aver.. that the time ..he.. delivered said
 execution to the said defendant as such sheriff, on, to wit, the
 day of, 19.., ..he.. instructed
 and directed the said sheriff to immediately levy the same upon
 any of the property of the defendant in execution, C, to be
 found by him in the said county of, and to imme-
 diately proceed according to law to sell the same and apply
 the proceeds towards the payment of ..h.. said execution.

Plaintiff.. further aver.. that afterwards, and on, to wit,
 the day of, 19.., the said
, plaintiff.. in said executions hereinbefore men-
 tioned respectively, then and there agreed to and with the said
 defendant in execution, C, and the defendant herein, B, sheriff,
 to again postpone the sale of said goods and chattels so held in
 the possession of the defendant as aforesaid and upon which
 the said defendant had levied plaintiff..'s writ of *feri facias*
 or execution, on, to wit, the day of,
 19.., without the consent of the plaintiff.., and the said sale
 was then and there again postponed without the consent of the
 plaintiff.. and against ..h.. protest until, to wit, the
 day of, 19.., and on said day of

....., 19.., by agreement between the parties aforesaid, without the consent and against the protest of plaintiff.., said sale was again postponed until the day of, 19.., and as to a portion of said goods so levied upon as aforesaid, until the day of, 19...

Plaintiff.. further aver.. that, on, to wit, the and days of, 19.., the said defendant as such sheriff sold the goods and chattels of said defendant in execution, C, so levied upon by him under plaintiff..s writ of execution as aforesaid, receiving therefor the sum of, to wit, dollars.

Plaintiff.. further aver.. that it thereupon became and was the duty of said defendant as such sheriff, to pay to the plaintiff.. out of the said money so received from the sale of said goods and chattels as aforesaid, the amount of ..h.. said writ of *fiery facias* or execution, together with interest thereon, after deducting from said proceeds the costs incurred by the defendant as such sheriff in selling the same and the amount necessary for him to hold and retain in his possession on said writ of attachment, but that the defendant, not regarding his duty in that behalf, then and there refused to pay to the plaintiff.. the amount of ..h.. said execution, interest and costs, or any part thereof, and did wrongfully and falsely return said writ of execution, on, to wit, the day of, 19.., with his endorsement thereon that he had applied said moneys on court execution Nos. and court execution No., after deducting his costs, and then being unable to find any other property of the said C in his county on which to levy, he therefore returned said writ in favor of plaintiff.., "No part satisfied," the said last mentioned executions from the and courts of county being the executions of the said, above mentioned.

Whereby, the plaintiff.. aver.. an action has accrued to ..h.. to demand of the defendant as damages, the amount of ..h.. said writ of *fiery facias* or execution, interest and costs as and for said false return of the sheriff thereon.

1296 Fencing railroad near depots

A reasonable space around station and depots which is exclusively used for public access to the railroad is not required to be fenced by statute.²⁷

²⁷ Butler v. Aurora, Elgin & Chicago R. Co., 250 Ill. 47, 49 (1911).

1297 Fraud and deceit, action

An action on the case is an appropriate remedy to recover damages for fraud and deceit practiced in securing the execution of a contract,²⁸ as by representing lands to be unincumbered when they are incumbered.²⁹ An action on the case in the nature of deceit is maintainable against a party, who, with a design to deceive and defraud another, makes a false representation of a matter required of him, by which a party to whom the representation is made, enters into a contract with a third person, and sustains an injury thereby.³⁰

The fraud and the deceitful representation which may constitute the ground of an action for deceit must be concerning an existing fact or facts, and must not be a mere promise to perform an act, although accompanied at the time with an intention not to perform it. Fraudulent representations are actionable whether verbal or written.³¹ The elements of the cause of action for fraud and deceit are representation, falsity, *scienter*, deception and injury.³²

1298 Fraud and deceit, declaration requisites

In an action for fraud and deceit, the averment that the defendant knew that the representations were false is essential to the statement of a good cause of action. The fraud and the *scienter* constitute the grounds of the action.³³

1299 Fraud and deceit, collusion between defendant and real estate agent, Narr. (Ill.)

For that whereas, on, to wit,, the plaintiff was engaged in the business of a carpenter in the city of, county,, and the defendant, D, was then and there a neighbor of the plaintiff and engaged in the business of a florist in aforesaid; that from time to time during three or four years preceding the above mentioned date plaintiff had done and performed work in the line of his business for the defendant, D; that in this way and through these means the relationship between himself and the said defendant, D, had become familiar and friendly; that said defendant, D, had been a resident of the city of

²⁸ Bates v. Bates Machine Co., 230 Ill. 619, 621 (1907).

²⁹ Hahl v. Brooks, 213 Ill. 134, 139 (1904).

³⁰ Weatherford v. Fishback, 3 Seam. 170, 173 (1841).

³¹ Grubb v. Milan, 249 Ill. 456, 463, 464 (1911).

³² Foster v. Oberreich, 230 Ill. 525, 527 (1907).

³³ Cantwell v. Harding, 249 Ill. 354, 357 (1911).

for many years, while he, the plaintiff, had only resided here about years, having come to this country from, and that by reason of defendant's superior means, longer residence in this country and experience in the business of florist, plaintiff reposed in said defendant much trust and confidence, particularly with respect to his statements about the business of a florist; that during this time the defendant frequently said to the plaintiff, that he, the plaintiff, ought to buy a small piece of land in the country near the city of and engage in the business of growing garden truck, flowers and vegetables for market; that he, the defendant, on account of his knowledge of the business, and on account of the trade he has established, could and would help the plaintiff to dispose of his produce in the city of, and thus aid the plaintiff in making large monetary gains and profits; that, on, to wit,, 19.., at aforesaid, the defendant stated to the plaintiff that he, the defendant, knew a man who had a piece of land convenient to the city and just suited and adapted to the needs of the plaintiff, and good for the business that he urged the plaintiff to undertake, namely, the raising of flowers and vegetables for market as aforesaid; and believing that the defendant was solicitous only for the welfare of the plaintiff, and that the defendant was moved only by desire to aid and assist the plaintiff, and that defendant was acting in perfect good faith and honesty with the plaintiff, he, the plaintiff, on, to wit, at the time and place last aforesaid, permitted the defendant, at his request, to enter into negotiations for a piece of land for the plaintiff, such as the defendant had informed the plaintiff would be best suited to the plaintiff's purpose, as above stated, that is to say, suitable for the raising of flowers and vegetables for market at a profit.

And plaintiff avers that soon thereafter, in pursuance of the permission given by plaintiff to defendant, as above stated, the defendant entered into negotiations with one G, at,, for the purchase from said G of a piece of land for the plaintiff, which piece of land, the defendant informed plaintiff, was entirely suited to the plaintiff's purpose as above stated, and was very rich and productive soil; but plaintiff avers that said statements were false and known to be so by the defendant when made to the plaintiff. And plaintiff avers that the defendant then and there obtained from the said G an offer to sell said land to the plaintiff for the sum of (\$.....) dollars, but that he, the defendant, with the purpose and intent of cheating and defrauding the plaintiff out of the sum of dollars, requested and instructed said G, when he, the plaintiff, should call upon him, the said G, with reference to the purchase of said land, to put the price of dollars thereon, and to name said sum of dollars to the plaintiff as the lowest price for which he, the said

G, would sell the same, with the fraudulent intent and purpose, that he, the said D, might himself receive the difference between said sum of, if such purchase should be consummated, and the said sum of dollars, for which the said G was willing to sell said land, which said G then and there agreed to do.

And plaintiff avers that by reason of the trust and confidence reposed by him, the plaintiff, in the defendant, as aforesaid, and by reason of the relation existing between the plaintiff and the defendant, and the authority and permission so as aforesaid given by him, the plaintiff, to the defendant, to negotiate in relation to the purchase of said land, it then and there became and was the duty of the defendant to act in the premises in perfect good faith and honesty with him, the plaintiff, and if it was the desire of the defendant to make any profit or commission or to receive any compensation for negotiating in reference to the purchase of said land for him, the plaintiff, that it was the duty of the said defendant, D, to state to the plaintiff what compensation, if any, he wished to receive.

And plaintiff avers that after obtaining said offer from said G to sell said land for dollars, as aforesaid, the defendant falsely and fraudulently and with the purpose and design of injuring, defrauding and deceiving the plaintiff and cheating him out of the said sum of dollars, on, to wit, the day of, 19.., at the county aforesaid, represented to the plaintiff that he had received from said G an offer to sell said land for dollars, and that said sum was the least for which the said G would sell the land; which representations were then and there false, fraudulent and untrue and known by the defendant at the time when made to be false, fraudulent and untrue; and were made by the defendant with the intent of having the plaintiff act thereon, and for the purpose of cheating, injuring and defrauding the plaintiff as aforesaid.

And plaintiff avers that afterwards and some time between the said day of, 19.., he, the plaintiff, went upon said land and called upon said G at his residence at, county,, who confirmed the statements and representations of said defendant, D, as to the price for which he, the said G, was willing to sell said land; and that afterwards, and on, to wit, the day of, 19.., plaintiff met said G at the house of the said defendant, D, and at the request of said defendant, and while still believing the defendant's statements and representations concerning the quality and desirability of said land and the price therefor all to be true and to be made in honesty and good faith by the defendant, and in reliance therein, he, the plaintiff, gave to said defendant the sum of (\$......) dollars to apply upon the purchase price of said land; and the plaintiff, together with his wife, L,

then and there took a conveyance of said land from said G and S, his wife; and afterwards, to wit,, 19..., plaintiff executed and delivered to the defendant, D, his promissory note for (\$.....) dollars, payable to the order of said D on or before one year after its date, and secured the same by chattel mortgage to said defendant, D, on the plaintiff's horse and wagon, under which chattel mortgage the plaintiff's horse and wagon was afterwards, and before the commencement of this suit, sold by the defendant; and afterwards and, on, to wit,, 19..., plaintiff paid to the defendant, D, the further sum of (\$.....) dollars in cash.

And the plaintiff avers that the defendant then and there, to wit, at the time and place last aforesaid, represented and stated to him, the plaintiff, that all said last mentioned sums, namely, said (\$.....) dollars cash, the amount of said note, (\$.....) dollars, and said (\$.....) dollars cash, had been advanced by the said defendant to said G on account of the purchase price of said land, which plaintiff avers it was then and there the duty of defendant to have done, and so to do, which said statements made by the defendant were false and known by him at the time to be false; and the plaintiff avers that said sum of (\$.....) dollars was retained by the defendant, and has ever since been retained by the defendant for his own use and benefit, and the plaintiff has thereby been by the defendant wrongfully, wickedly and deceitfully cheated and defrauded out of said sum.

And the plaintiff further avers that by notes and mortgages executed and delivered by himself and his wife, L, to the said G, on, to wit, the said day of, 19..., he, the plaintiff, bound and obligated himself to pay an additional dollars for said land, which said land is described as follows, to wit (Insert description). And the plaintiff further avers that a suit was instituted in the court of county, some time in the month of, 19..., by said G against the plaintiff and his said wife, L, to foreclose said mortgage and to enforce a vendor's lien on said premises for the said sum of dollars, so retained by the defendant, D, as aforesaid, in which suit a decree was entered on, to wit, the day of, 19..., foreclosing said mortgage and enforcing said vendor's lien in favor of said G on said premises.

And plaintiff avers that he has been compelled to lay out and has laid out and expended a large sum of money, to wit, the sum of (\$.....) dollars in and about defending said suit, and has lost much time, to wit, time of the value of (\$.....) dollars in the premises, and in moving his family and belongings unto said land and in removing them therefrom; and the plaintiff avers that he is a poor man without pecuniary means, and without sufficient

means to further prosecute or defend said suit or to redeem said premises from the sale had under said decree, and he, the plaintiff, has virtually lost all his right, title and interest in and to said premises; and the plaintiff avers that he was induced to pay said sum of (\$.....) dollars to give said chattel mortgage and to make said notes and mortgage, and has been compelled to expend said sums and has lost his said time by the fraud and deception practiced on him by the defendant as aforesaid.

Wherefore, plaintiff says that the defendant deceived and defrauded plaintiff to the damage, etc.

1300 Fraud and deceit; incumbrance, non-resident, Narr. (Ill.)

For that whereas, the plaintiff, on, to wit, the day of, 19.., entered into negotiations with the defendants at their request to purchase of them a large tract of land, to wit, acres lying in county,, for a certain consideration to be paid by the plaintiff to the defendants, to wit, dollars, that is to say, that the plaintiff should turn over to said defendants (Describe property) belonging to him valued at dollars and execute a mortgage on the (Describe property) for the balance of the purchase money, to wit, dollars, and for the purpose of inducing the plaintiff to purchase said land for said consideration and close the trade in said manner, said defendants then and there fraudulently, falsely and knowingly represented to him that they owned said land in fee simple and that their title thereto was free and unincumbered with liens of any character. And the plaintiff avers that said negotiations were carried on in said state of, while this plaintiff was temporarily in said state, he being a citizen and resident of the state of, which was well known to the defendants, and that he was unfamiliar with the title to real estate in said state of, and had no extensive acquaintance with persons in said state of and before agreeing to take said land at said price and before agreeing to close the trade in the manner aforesaid, then and there informed said defendants that he would not take said land or close the trade until said defendants furnished him with an abstract of title thereof, which was to be examined by some reliable attorney to be procured by said defendants, said attorney to give his opinion thereon. And the plaintiff avers that said defendants thereupon then and there introduced the plaintiff to one of said county, and recommended said to him, the plaintiff, as a reliable and competent attorney, who had examined the abstract of title, and the defendants and said attorney, although knowing that said land was incumbered with liens to the extent of, to wit, dollars, and that said abstract showed said

liens, nevertheless said attorney falsely stated to the plaintiff as his opinion of said title that said abstract showed good and valid title in fee simple in said land in them, the defendants, and that it also showed that the same was free from and unencumbered with liens of any character, whereas, in truth and in fact, said land as shown by said abstract of title was incumbered as aforesaid. The plaintiff avers that by means of such false and fraudulent representations of the said defendants and said attorney and confiding and relying upon the same, he was induced to and did purchase said land and close the trade therefor, turning over to the defendants said (Describe property) at said agreed value, and did execute and deliver to the defendants a mortgage on the (Describe property) for dollars upon the execution and delivery of a deed for said acres to him. By means whereof the defendants falsely and fraudulently deceived the plaintiff in the purchase of said tract of land. To the damage of the plaintiff of dollars; and therefore, he brings suit.

1301 Fraud and deceit; infringement of patent, Narr. (Ill.)

For that whereas the plaintiffs were, and prior to, on, to wit, the day of, 1..., engaged in the manufacture and sale of a certain device known as the dryer, which was used for the purpose of drying brick and tile; and whereas the defendant, the company, a corporation, was engaged in the manufacture and sale of a device used for the purpose of drying brick and tile, in many respects similar to the device manufactured and sold by the plaintiffs; and whereas the said was president and the said was secretary of the said company, a corporation, and were both stockholders in the same.

And whereas the plaintiffs and the company both had their headquarters in the city of, and were both competitors in the sale of their respective devices, the plaintiffs allege that the said company, through its said president and secretary, for the purpose of increasing the sale of the said company's device, and of injuring the sale of the plaintiff's device, wrongfully, fraudulently and falsely represented and stated to the company and divers other corporations and persons who were then and there negotiating with the plaintiffs for the purchase by each of them of one of the plaintiff's said devices, that the plaintiff's device was an infringement upon the patents which they allege the company had from the United States government covering said device of the company, and that if they, the company, and the said divers other corporations and persons or any of them should purchase and use the plaintiff's said device, that the company would sue the said purchaser or pur-

chasers for infringement upon the said alleged patents of the company.

And the plaintiffs further allege that the said company, and the said and, to more effectively attain their said object, to increase the sale of their own device and injure the sale of the defendants, then and there wrongfully and without just cause, commenced a suit in the United States court in and for the district of against the, alleging that the said company was infringing upon the said alleged patents of the company, in using a certain dryer which the company had purchased from the plaintiffs.

And the plaintiffs further allege that the said device, manufactured and sold by them for the purpose of drying brick and tile, was not an infringement upon any patent or patents granted by the United States government covering the device manufactured and sold by the company, and the plaintiffs allege that the said false and fraudulent statements made by the said officers of the said in its behalf and the commencement of said suit materially contributed towards causing the said company and the divers other corporations and persons aforesaid to refuse to purchase the plaintiffs' device, and they did so refuse; and the plaintiffs further allege, that the defendants gave the said false and fraudulent statements general circulation and publicity, and that as a result thereof purchasers generally refused to purchase plaintiffs' device, and the plaintiffs allege that by reason thereof they have been deprived of great gains and profits that they would have derived and made from the sale of the said device to the said persons and corporations aforesaid and to purchasers generally; and that by reason of the said false and fraudulent statements their business has been greatly damaged and injured, to the damage of the plaintiffs of dollars. Wherefore they bring their suit, etc.

1302 Fraud and deceit; insurance policy, surrender, Narr. (Ill.)

For that whereas, on, to wit,, 19.., one made application in the county aforesaid to the of, one of the defendants herein, to insure his life in the sum of dollars, for the benefit of the plaintiff herein, who was then the wife of the said; and the said, in consideration thereof complied with all of the terms and requiremnets imposed or asked by said defendant as conditions precedent to the issuance of said policy, and paid to it the first annual premium thereon required by said defendant, which payment was accepted and retained by said defendant; and in consideration thereof

the said defendant at the time and place last aforesaid, made out, in the usual form and delivered to him, the said, the said policy of insurance, the amount thereof by the terms of said policy being made payable upon the death of said insured, to his wife, the plaintiff herein, as aforesaid, which policy the said then and there accepted from said defendant and at once delivered it to the plaintiff who kept and retained it until as hereinafter stated.

And plaintiff avers that afterwards and on, to wit, the said who is, and for many years last past, has been an agent of the said of, and at its instigation and under its direction represented to said plaintiff that he would loan her the sum of dollars on condition that she would let him hold said policy of insurance as security for said loan; and plaintiff avers that in consideration thereof she accepted from the said, said sum of dollars and delivered to him said policy of insurance to hold as security as aforesaid; and plaintiff avers that as soon as said procured said policy, he, in collusion with the said of, fraudulently and with the sole purpose of cheating and defrauding the plaintiff out of said policy and the benefit thereof, returned the said policy to the said of who has ever since retained the same and now claims to own it.

And plaintiff avers that on, to wit,, the said died in,, and that plaintiff before the commencement of this suit made several demands upon each of said defendants for said policy and for the amount due her upon the same and that said defendants have each refused to surrender or deliver up said policy, or to pay her any part of the amount due her upon the same, and that she, plaintiff, after the death of the said and before this suit was begun, tendered to the said the sum of dollars in legal tender money of the United States with legal interest thereon from the time he loaned her said money as aforesaid, on condition that he would surrender to her said policy, which said has neglected and refused to do.

And plaintiff avers that said policy upon the death of the said was and still is of the value of dollars and that she has frequently demanded that sum of the defendants which they have and each of them has refused to pay, in consequence whereof she is damaged in the sum of dollars; wherefore, etc. (Add count in trover).

1303 Fraud and deceit; notes secured by bogus trust deed on leasehold, Narr. (Ill.)

For that whereas, on the day of, the defendant, D, was the owner of a certain leasehold interest,

together with a certain building thereon, upon the following described real estate, situated in the city of, county of, and state of Illinois, to wit, (Describe real estate) in said city; that the ground rent to the amount of about (\$.....) dollars was past due on said leasehold, and the owner of the fee was threatening to forfeit the same, and that said D then and there knew that his interest in said real estate was worthless, and being a man of large wealth and thoroughly acquainted with real estate values in, and a cunning schemer, and well knowing that the general public had little knowledge of leasehold values, he conceived the scheme of conveying his interest in said real estate for the fictitious sum of dollars and having the vendee execute a trust deed to the company, a corporation and a public trustee, doing a large, reputable and responsible trust business in said city of, to secure the payment of certain notes, aggregating the sum of dollars; and thereby representing through the public records and abstracts of title to the public that said property had been sold for the sum of dollars, and was therefore worth that sum, and thereby impress upon the public that one quarter of said purchase money had been paid, when in truth and in fact the said D had no idea that said leasehold interest in said real estate could be sold to any person knowing the facts for any sum.

That said defendant D, for the purpose of cheating and defrauding said plaintiff and others, conspired with one M, a brother-in-law of said defendant D, and the said defendant C M, whereby, on, 1...., the said defendant D and his wife conveyed said leasehold interest to said M without any consideration therefor, and that on, to wit, the day of, 1...., the said M conveyed his interest in said real estate to the defendant, C M, who was a man of no financial means or responsibility, the said M and the said defendant C M, being mere tools in the hands of said defendant D.

That the consideration as stated in said deed from M to said C M was the sum of dollars, but that in truth and in fact there was no consideration whatever for said deed; that on said last mentioned date, and as a part of the same transaction, and for the purpose of cheating and defrauding said plaintiff and others, the said defendant D had the said defendant C M execute to the said company a trust deed on his interest in the said leasehold securing the payment of notes for the sum of dollars each; ten notes for the sum of dollars each, all due in one year after date; and sixty-two notes for the sum of dollars each, all due in fifteen months after date; all of which said notes were executed by the said defendant C M payable to his own order and by him endorsed, and were then and there, in pursuance of said design

to cheat and defraud said plaintiff and others, turned over to said defendant D.

That said defendant D, for the purpose of carrying out his said scheme and design to cheat and defraud this plaintiff and others, caused the said deed so executed by himself, the said D, and his wife to the said M to be filed for record in the recorder's office of said county, and for the further purpose of defrauding said plaintiff and others caused said deed from said M to said defendant C M to be filed for record in the recorder's office of said county, and also the trust deed from said C M to the said company; and that said defendant D caused the said company to be named as trustee in said trust deed and in said notes for the purpose of committing a fraud upon the plaintiff and other parties, who might afterwards, in investigating the value of said notes and said security, believe that the transactions represented by said deeds and notes were bona fide transactions, when in truth and in fact said property was never sold to said M nor to said defendant C M for any sum.

That said defendant D caused said trust deed from said defendant C M to the said company to be made in such a manner that it should appear to be given upon the said entire premises known as street in said city of, as security for an indebtedness of dollars, when in truth and in fact the only interest the said defendant D, or the said M, or the said defendant C M had in said premises was a leasehold interest which the said defendant D then well knew to be of no value, and entirely worthless.

That afterwards said defendant D took possession of said notes and obtained an abstract showing the title to said property including the trust deed securing said notes, and well knowing that said notes had no security, and that said M was utterly worthless financially and that said defendant C M was utterly worthless financially, said defendant D placed said notes on the market in the city of for sale; and also offered said notes in exchange for other property.

And the plaintiff avers that subsequently he was desirous of exchanging acres of land for some good real estate securities, and that for the purpose of so doing he applied to the said defendant D in said city of to secure an exchange of the said acres of land, of the value of, to wit, dollars, for some good real estate securities, and that he was thereupon shown two of said dollars notes which showed that the said notes were secured by trust deed to company, on building No. street, in said city of, and which showed that the title to said street was insured by said company by its policy of title insurance, the said company being then also engaged in doing a large, reputable and responsible busi-

ness insuring against defects in land titles; and this plaintiff avers that he was conducted by said defendant D to a place within sight of, and in close proximity to said premises located at said street in said city of; and that the said defendant D then and there exhibited to plaintiff the said premises, and then and there falsely and fraudulently stated and represented that the said notes were secured by trust deed on the said premises, and with the intent and design to deceive and mislead this plaintiff into the belief that the said notes were secured by trust deed upon the fee in said premises.

That the said defendant D with a design to cheat and defraud this plaintiff falsely and fraudulently stated to plaintiff that the notes hereinbefore described were gilt-edged and that the property at street, securing said notes, was worth at least twice as much as the incumbrance on it, which was the trust deed securing these dollars notes, and that a loan of dollars had been made on said property at street; thereby intentionally and designedly deceiving and misleading this plaintiff into the belief that said notes were secured by a trust deed upon the fee in said premises at street, and that said fee was valued at far more than the amount of the notes named in the trust deed, and was ample security for the payment of the notes.

That said defendant D, with a further design and intent to cheat and defraud this plaintiff, then conducted this plaintiff to one B, who, at the prior instigation of, and then in the presence of, and on behalf of the said defendant D, falsely and fraudulently stated and said that others of the said notes so secured by the said trust deed had been purchased by eastern capitalists, who had investigated the matter, for eighty-five per cent of their face, which said statements were false and untrue, and were then and there known by the said defendant D and by the said B to be false and untrue; and plaintiff avers that said false statements and the said misrepresentations were planned by the said defendant D and were made with the intention of defrauding and swindling plaintiff out of his said property.

And that said defendant D represented that the company was the trustee named in the trust deed for dollars, and that plaintiff then and there inferred and believed that the amount stated in said trust deed was correct; and plaintiff avers that by means of the premises he was thereby made to believe that the trust deed was upon the said premises located at number street, in the said city of; and that it was ample security to the trustee or any party owning said notes or any of them as aforesaid.

And the plaintiff avers that the two dollars notes aforesaid were drawn by the defendant D, or under his direction, and were caused by the said D to be printed in part; and the company named as trustee in said notes, and

the name "..... company,,," printed across the end of said notes; and the date, to wit, ".....," printed upon the said notes; and the endorsement in handwriting upon the back of said notes, to wit, "This is one of the notes referred to in our policy of title insurance No., company, by, secretary," and in order to impress this said plaintiff and others that the said notes were of great value, and that the transaction was a legitimate one; which said notes so submitted to, and which were afterwards delivered to this plaintiff, are in words and figures following, to wit: (Insert notes and endorsements) and plaintiff avers that the said endorsements mentioned last above, purporting to be of interest paid, were inadvertently made, and that in truth and in fact no payment of any interest on said note was ever made by any person.

And plaintiff avers that relying on the truth of the statements, said representations contained on the face of said notes and on the back of said notes; and upon the statements and representations made to this plaintiff by the said defendant D, and by the said B, he did, on, to wit,, 1...., execute a deed for the said acres of land, of the value of, to wit, dollars, conveying the said land to, to wit, the said D, and received for the said deed the said dollars notes hereinbefore mentioned.

And plaintiff avers that he resides at, and that afterwards, on, to wit,, 1...., he was informed, and has long since learned that it was the truth, that the pretended sale by said defendant D to said M and to said defendant C M was a bogus transaction, and that the said trust deed to the said company was without consideration, and that the entire transaction from the drafting and having printed said notes to the recording of the trust deed, and to the said false representations of the said defendant D, and of the said B, was a scheme to cheat and defraud the plaintiff, and done for the purpose of placing upon the market notes that were fraudulent and of no value whatever, and that the said notes so received by this plaintiff were and are worthless; that the property involved was and is worthless, and that the leasehold interest of said defendant D was and is worthless. To the damage, etc.

1304 Fraud and deceit; oil stock, Narr. (W. Va.)

For this, that heretofore, to wit, on the day of, 19.., at the county aforesaid, the plaintiff, relying upon the representations and statements, hereinafter set out, made to him by said defendants, bargained with the said defendants and at their request, to buy, and did buy of them certain oil stock in a corporation to be immediately organized and to be known as the S company, at a certain price, to wit, the sum

of dollars; and these defendants did knowingly and wilfully, then and there, falsely and fraudulently represent the said stock and the facts connected therewith in this, to wit, that the said S company should be a corporation of an authorized capital of \$...., divided into (....) shares of \$.... each; that there would be no hold out or promoters' stock; that this plaintiff was getting his stock on the same basis and footing, manner and cost that the said defendants were; that they, the said defendants, were paying for, and putting up their money for all stock they would have, the same as the plaintiff; that the said leases owned by and upon which the said company should operate were about acres in county, West Virginia; that said leases had been secured by said defendants only a few days prior thereto direct from the owners of the land; that the P company had said land leased, and the said P company by an oversight had allowed the rental to go over one day, and that said defendants had arrangements made with the said owners, that if the P company did not pay the rent on the day it was due that the said defendants should have a lease on the lands if they would put down a well at once, which arrangements were made and the said leases then secured direct from the owners of the land; that said land lay in a solid body; that said leases were surrounded in close proximity on three sides by some producing oil wells; that some of said wells were within feet of the line of these said leases; that the wells that had come in there had been very large, starting off with a production of from to barrels per day; said defendants then and there sold said stock to the plaintiff, said plaintiff relying fully upon the said statements made by said defendants, for the said sum of \$....., which has been fully paid to said defendants as directed by them; whereas, in truth and in fact, the charter for said S company had, at the time of making said false statements as to amount of capital stock and value of shares, been issued on the day of, 19.., with said defendants as incorporators, and with an authorized capital of \$..... and divided into shares of \$..... each; that afterwards upon the organization of said corporation, \$..... of said stock was held out or taken from said corporation as promotion stock and divided among said defendants; that a $\frac{1}{8}$ part of all oil produced from said leases was over and above the $\frac{1}{8}$ part going to the landowner, set over, without consideration, to one of the promoters of said corporation, and likewise divided with said defendants; that said defendants put up no money whatever for their said stock; that said defendants did not secure the said leases direct from the landowners; that the P company did not have these said lands leased at that time, nor did they suffer rentals to go unpaid on them as represented; that there were not producing oil wells on three sides of this said property in close proximity; that there were no oil wells within feet of the line of said

leases; that no wells of any such production as represented by said defendants ever came in that field and in close proximity to these said leases; and the plaintiff says that said defendants, by means of these premises on the day aforesaid, did knowingly and wilfully, falsely and fraudulently deceive the plaintiff on the sale of said stock as aforesaid; and that said stock thereby is worthless and that upon the day aforesaid had no value to this plaintiff and that the plaintiff has suffered great damage by reason of the money paid out, and the loss of the use and interest of said money and that he is thereby greatly damaged.

2. And also for this that said defendants, ever since the organization of said S company mentioned and described in the first count in this declaration, have been officers thereof, to wit:, president;, treasurer;, secretary; and as such immediately after the organization of said company proceeded to cause a well to be drilled on said territory of said company; that said well produced oil, that said defendants then and for a long time thereafter represented to this plaintiff that the said well was producing barrels of oil daily; and this plaintiff, to wit, on the day of, 19.., applied to said defendants for information concerning the production of oil from said well, telling said defendants, at the time, that a party had offered to sell said plaintiff some stock in said company, and said plaintiff sought information upon which to place a value upon said stock; that said defendants holding the offices in said company as aforesaid, did then and there, knowingly, wilfully, falsely and fraudulently tell this plaintiff that said well was producing barrels of oil daily, and that it was very valuable; that the stock of said company was selling at the price of dollars for one dollar of the capital stock of said company, and that it would be worth more.

This plaintiff, relying wholly and solely upon the statements made to him by these defendants as aforesaid, entered upon the negotiations for said stock and became the purchaser of a large amount of stock of the said corporation, for which he paid the sum of \$...... in money.

And this plaintiff says that said defendants, by means of these premises on the day aforesaid, did knowingly, wilfully, falsely and fraudulently misrepresent the facts and deceive the plaintiff as to amount of production of oil of said well and as to the value of said stock as aforesaid; that said stock, thereby, is worthless and of no value and that upon the day aforesaid had no value to this plaintiff, and that the plaintiff has suffered great damage by reason of the money paid out for said oil stock, the loss and use of said money and the interest thereon and that he is thereby greatly damaged.

And therefore, the said plaintiff says that by reason of the premises and the matters and things in the said two counts in this declaration before mentioned, an action hath accrued to

him to have and to demand of and from the said defendants for and by reason of the false statements, misrepresentations and deceit and fraud practiced in said two counts mentioned, damages to the amount of \$.....

And therefore he brings this suit.

1305 Fraud and deceit; shares of capital stock, Narr. (Ill.)

For that whereas, on or about the day of
, 19.., in the county aforesaid, in consideration that the plaintiff at the request of the defendant, would buy of the defendant, the defendant's shares of capital stock, same being interest in the, a corporation at a certain price, to wit, the sum of (.....) dollars cash to be paid therefor by the plaintiff, the defendant promised the plaintiff and represented to him that the said was a corporation doing a large and remunerative business, and that the same was clearing per year profit; and that he, the plaintiff, if he purchased said interest, could draw per year salary for acting as one of the officers of said corporation; and thereupon the said plaintiff, confiding and relying on the said promise of the defendant, then and there bought the said shares of capital stock and interest of the defendant and paid him the said sum of money. Yet the defendant did not regard his said promise but thereby deceived and defrauded the plaintiff, in this, to wit, that the said corporation was not doing a good and large business, and was not clearing per year profit, and was not in a position to pay dollars to plaintiff for salary as an officer of said corporation, but on the contrary said corporation had been insolvent for a long space of time, to wit, for year previous to the making of said representation and promise and had been doing business at a loss; all of which said defendant well knew at the time of making said representation and promise, whereby said shares of capital stock and interest in said corporation then and there became and were of no value to plaintiff; wherefore the plaintiff says he is injured and has sustained damages to the amount of (.....) dollars, and therefore he brings his said suit.

1306 Fraud and deceit; unrecorded trust deed, Narr. (Ill.)

For that whereas the defendant at, to wit, the day of, 19.., in, to wit, the county of, and state of Illinois, being an owner and dealer in real estate; the plaintiff then and there applied to the defendant and bargained with him for the purchase by the plaintiff from the defendant of a certain parcel of land situate in, to wit, the city of, in the county and state aforesaid, to wit, (Describe real estate); that prior to the time of said bargain-

ing between him and the defendant for the purchase of said parcel of land as aforesaid, the defendant and his wife, , on, to wit, the day of , 19... , executed and acknowledged a certain deed of trust conveying the said parcel of land, together with certain other land, to D to secure the payment of, to wit, (.....) dollars, with interest thereon, etc.; that at the time of the said bargaining between the plaintiff and the defendant for the purchase of said parcel of land, as aforesaid, said last mentioned deed of trust was in full force and effect and unsatisfied, and an incumbrance against said parcel of land, had not, at the time last aforesaid, been placed on record; that it became and was the duty of the defendant, at the time and place aforesaid, to inform and notify the plaintiff of the existence of said deed of trust; that at the time and place aforesaid, in consideration that the plaintiff at the request of the defendant would purchase of the defendant the said parcel of land hereinbefore described at an agreed price of, to wit, the sum of (.....) dollars, to be therefor paid by the plaintiff, the defendant, with the intention and for the purpose of inducing the plaintiff to purchase said parcel of land wrongfully, injuriously and contriving and intending to deceive, defraud and injure the plaintiff, fraudulently and deceitfully refrained from informing the plaintiff of the execution and existence of said deed of trust, or that the same was then, on the day last aforesaid, an incumbrance against said parcel of land.

And the plaintiff further avers that he then and there, at the time and place last aforesaid, relied upon the silence of the defendant in regard to the existence of any incumbrance against said parcel of land as an indication or representation by the defendant that there then existed no incumbrance upon said parcel of land; and that the plaintiff then believed that there was then no incumbrance or cloud upon the title to said parcel of land, and that thus relying upon the silence of the defendant and failure to notify the plaintiff of the fact as aforesaid, the plaintiff then and there purchased from the defendant, and the defendant then and there deceitfully sold the said parcel of land to the plaintiff for a large sum of money, to wit, the sum of (.....) dollars, which said sum of money the plaintiff thereafter, on, to wit, the day of , 1..... , and before the plaintiff discovered the existence of said deed of trust and the cloud upon the title of the defendant to said parcel of land, paid the defendant.

And the plaintiff further avers that at the time he bargained with the defendant for the purchase of said parcel of land, as aforesaid, the defendant knew that by his silence and failure to inform the plaintiff of the existence of said deed of trust as an incumbrance upon said parcel of land, that the plaintiff would conclude and believe that no incumbrance or deed of trust existed

as a lien or cloud upon the defendant's title to said parcel of land.

That the said incumbrance of (.....) dollars has not been removed from said parcel of land; but, on the contrary, the plaintiff avers that said (.....) dollars then remaining unpaid and due, the then owner and holder of certain notes evidencing said (.....) dollars indebtedness, to wit, one S, and the said D as trustee, on, to wit,, 1...., filed their bill in chancery in the circuit court of county and state aforesaid against the plaintiff and the defendant and his said wife to foreclose the said trust deed upon the property in said trust deed to said D described; and that such proceedings were thereafter had in said suit by said S, and said D, trustee, that the said parcel of land was sold under an order of said circuit court to some person, or persons, to the plaintiff unknown, but other than the plaintiff, the said defendant or his said wife, or either of them; and that the period of redemption under said sale of said last mentioned property, by the statute in such case made and provided, has expired; that no redemption of the parcel of land has been made; that the said parcel of land has been taken from the plaintiff by virtue of said proceedings and said sale in said circuit court; and that by reason of the premises the said parcel of land then and there became and was of no value to the plaintiff. Wherefore, etc.

1307 Highways and bridges, action, parties

In Michigan the overseer of highways of each district, or in case of his neglect or refusal, or in case he is himself the offender, then the commissioner of highways of each district, and not the township, should bring an action for damages done to highways and bridges.³⁴

1308 Hotel and inn-keepers, stolen property, action

Hotel and inn-keepers owe a duty towards their guest's property imposed by the common law for a breach of which duty an action on the case will lie in favor of the guest whose property is stolen through the inn-keeper's dishonest employees, unless the guest's carelessness substantially contributes to the theft.³⁵

1309 Inadequate fire protection, action

In Illinois the property owner cannot hold a municipality or water company liable for loss by fire occasioned by the failure

³⁴ *Denver Township v. White River Log & Booming Co.*, 51 Mich. 472, 473 (1883).

³⁵ *Johnson v. Richardson*, 17 Ill. 302 (1885).

of the water company to furnish an adequate supply of water for fire protection, where the municipality has contracted with the water company to construct and operate water works for the purpose of furnishing water to the city and its citizens.³⁶

1310 Infectious premises, Narr. (Ill.)

For that whereas, on, to wit, the day of
, 19.., at, to wit, the county aforesaid, and for a long
 time prior thereto, the plaintiffs were the owners of and in the
 lawful possession of the premises described as follows: (Set
 forth description), together with the dwelling house or build-
 ing and its appurtenances thereon standing and belonging of
 the value of dollars, which said land and prem-
 ises said plaintiffs, before and at the time aforesaid, used and
 enjoyed, and of right ought to have used and enjoyed, as and
 for a home and dwelling house or tenement house purposes, and
 still of right ought to use and enjoy as aforesaid; nevertheless,
 said defendant, acting at the time aforesaid, and long before
 and hitherto has acted, and still acts, by means of a common
 council in that behalf, having the care, superintendence and wel-
 fare of said city defendant, contriving unjustly and unlaw-
 fully to injure plaintiffs in the possession, use, occupation and
 enjoyment of said premises, and especially said house and build-
 ing thereon standing as aforesaid, and to render said premises
 incommodious and unfit for home, dwelling house or tenement
 house purposes, and of little or no use to plaintiffs, while said
 plaintiffs were so possessed thereof, and so used and enjoyed
 the same as aforesaid, on, to wit, the day of
, by its said common council, aforesaid, passed or caused
 to be passed and enacted a certain ordinance, to wit, ordinance
 number, entitled, "An ordinance to condemn as a nuis-
 ance the wooden building known as the, situate on
 lot, in block, in that part of the city known as
 and to authorize and direct the destruction of the same and
 its contents," which ordinance, was approved by the mayor
 on the day of, 19.., and is hereto
 attached, marked exhibit "A," as a part of this declaration,
 was and is illegal and void, as an unwarranted and improper
 exercise of arbitrary power and discretion, contrary to the con-
 stitution and statutes of this state, and otherwise is *ultra vires*
 and illegal.

By means whereof, said defendant then and there arbitrarily
 and without lawful authority undertook to declare, and did
 declare plaintiffs' said premises, to wit, the building and house
 thereon as aforesaid, by reason of the alleged infectious diseases

³⁶ Galena v. Galena Water Co., 229
 Ill. 128, 132 (1907).

therein, to wit, smallpox, to be a public nuisance, without any authoritative investigation or inquisition beforehand, or the finding of any jury or tribunal that the same was so infected as to be inimical or a menace to the welfare of the public, and when the same was not then and there incapable of disinfection and was not then and there a nuisance or menace to the public; and did without notice to plaintiffs, or compensation to them paid, or any finding or award of damages to plaintiffs, or any offer by said city in that behalf to reimburse plaintiffs, by said ordinance proceed to and did condemn said premises, to wit, the house and building thereon as aforesaid, to be utterly destroyed and removed, together with the appurtenances and contents thereof; and said defendant, by its servants and officers in that behalf, acting or pretending to act under and by virtue of the authority of said ordinance, on, to wit, the day first aforesaid, at, to wit, the county aforesaid, entered upon plaintiffs' said premises, and did then and there set fire to, consume, and utterly destroy said house or building and its appurtenances, then and there being, of the value, to wit, dollars; and did so as aforesaid commit the grievances complained of, without the leave or license, and against the will of the plaintiffs, from the time aforesaid, to wit, hitherto, and without any compensation whatsoever paid plaintiffs, or any one of them, or anything by way of reward or satisfaction therefor; and thereby during the time aforesaid, the defendant, by the means aforesaid, did greatly injure and damage said premises, and did hinder and prevent plaintiffs from having the use, benefit and enjoyment thereof, to the amount and extent so as aforesaid specified, and did thereby deprive plaintiffs utterly of the use and benefit of said house and building, to the damage of plaintiffs of dollars.

2. And for that whereas, on, to wit, the day of, 19.., at, to wit, the county aforesaid, the plaintiffs were the owners of and in the lawful possession of the premises hereinbefore described, and commonly known as the of the value, to wit, of dollars, which said house and premises the plaintiffs, before and at the time aforesaid, used and enjoyed, and of right ought to have used and enjoyed, as and for a home, dwelling house or tenement house purposes, and did have, use and enjoy the rents, issues and profits thereof, amounting, to wit, the sum of dollars per annum; and said plaintiffs being so possessed of, using and enjoying said property, and the rents, issues and profits thereof, as aforesaid, the defendant, city of, on, to wit, the day of, 19.., at, to wit, the place aforesaid, enacted, or caused to be enacted by its city council in that behalf, a certain ordinance, to wit, ordinance number, entitled, "An ordinance to condemn as a nuisance the wooden building known as the situate on lot, in block, in that part of the city known as,

and to authorize the destruction of the same and its contents;” which ordinance, was approved, by the mayor on the day aforesaid is in the foregoing count set out, attached and marked exhibit “A,” and is hereby made part of this count by reference; in which ordinance so passed and enacted it was ordained, by section, that whereas, said was occupied by a large number of persons infected and suffering with smallpox, and whereas, said house was impregnated with the germs of said disease, and was in such condition that it could not be successfully disinfected, and that necessity required its destruction, it was thereby declared to be a public nuisance; by (section) it was required that the health commissioner of said city remove all occupants of said house to the pest-house or other place of isolation, etc.; and (section) provided that after removal of said occupants, the superintendent of streets, health commissioner and fire marshal of said city should tear down said house, and wholly destroy the debris and contents impregnated or exposed to the germs of said disease, and not capable of disinfection.

The plaintiffs allege that said premises, described in said ordinance as the was not a public nuisance, or by reason of the germs of said disease so permeated therewith as to be incapable of fumigation and disinfection; that said house then and there was not necessarily a menace or inimical to the health and welfare of said city and inhabitants; that it became and was the duty of defendant to deprive the plaintiffs of said property and destroy the same only by due process of law; that said ordinance, so enacted and passed, was an arbitrary and improper exercise of the power and discretion of said city council, and illegal and void; that it became and was the duty of said city, before proceeding to take, condemn and destroy said property for the use, benefit and protection of the public, as by said ordinance claimed and pretended, to ascertain by some authoritative measures or investigation, by the determination of inquisition, by the decision of a jury, or by some other legal and proper means, that said property was a public nuisance and detrimental to the safety and welfare of the people; that it became and was the duty of said city, before proceeding to take, condemn and destroy said property for and on behalf of the public and its welfare, to institute proceedings under the law of eminent domain, or, in some legal and proper method, ascertain the just compensation in damages to be awarded plaintiffs and to award and to pay the same to them in money, before taking and destroying the same; that it became and was the duty of said city, by its servants in that behalf, not to destroy said property utterly, but to undertake to, and fumigate and disinfect the same, and to save and keep from destruction, for and on behalf of plaintiffs, so much thereof as might be of value or use in the construction of another house or building.

Yet, the said city of, by its officers and servants in that behalf, disregarding its duties as aforesaid, under said ordinance, proceeded to and did condemn the plaintiffs' said property as a public nuisance, without any lawful or authoritative investigation or determination, beforehand, or judicial proceedings, or otherwise as aforesaid, that the same was obnoxious to the public, without notice to plaintiffs, or any proceedings under the law of eminent domain, or any ascertainment of the just compensation in damages to be awarded and paid plaintiffs, and without any other effort or means of protecting the plaintiffs and their rights in said property, on, to wit, the day aforesaid, at, to wit, the county aforesaid, proceeded to and did condemn said property as aforesaid, and by its servants and officers in that behalf, unlawfully entered upon said premises, tore down said building set fire to and utterly destroyed the same and its appurtenances, without the leave or license, and against the will of plaintiffs from the time aforesaid, to wit, hitherto; and thereby the defendant, by its servants as aforesaid, did greatly injure said premises, and did deprive the plaintiffs from the use and enjoyment of said house and building, and the rents, issues and profits thereof as aforesaid, so that by means of the premises the said building was taken and destroyed; to the great damage, etc.³⁷

1311 Interference with public sale, declaration, requisites

In an action for damages arising from a wrongful and malicious interference with an administrator's or an executor's sale, the declaration must specifically allege special damages, how and in what manner they were sustained, and that the damages actually and positively occurred in consequence of the defendant's wrongful acts and not in any degree with the plaintiff's own negligence or omission.³⁸

INTOXICATION

1312 Nature and scope of action, parties

An action under the Illinois Dram-shop act is civil and not penal in its nature.³⁹ Any person who is injured in person, property or means of support, either by an intoxicated person or in consequence of the intoxication of any person, has a cause of action against the person causing the intoxication, regardless of any business or personal relation between the person injured and the intoxicated person.⁴⁰

³⁷ *Sings v. Joliet*, 237 Ill. 300 (1908).

³⁸ *Burnap v. Dennis*, 3 Scam. 478, 481 (1842).

³⁹ *Woods v. Dailey*, 211 Ill. 495, 496 (1904).

⁴⁰ *Nagle v. Keller*, 237 Ill. 431, 432, 433 (1908).

A parent who is obliged to support an adult son on account of his habitual intoxication has a right of action against the person who caused the intoxication.⁴¹ This right of action exists under Michigan Civil Damage act, notwithstanding the absence of an order of court for the support of a parent.⁴² The wife and the children may join in a single action to recover damages for the unlawful sale of intoxicating liquor to the husband and father where their support was joint, although the wife and the children have separate actions for the same loss.⁴³

A party is liable if he causes in part the intoxication which produced the injury.⁴⁴ Each person who assists in bringing about an habitual drunken condition of another person is liable, under the Illinois statute, for the acts of all persons who contributed by the furnishing of intoxicating liquors in producing that condition.⁴⁵

1313 Principal and surety, action

In Michigan, the principal and his sureties for successive years are responsible, under the statute, for the entire injury caused by intoxication, where the damages claimed are not the result of a specific act of intoxication, but extend through a period of time and the unlawful acts are permitted after the execution of the bonds.⁴⁶

1314 Joinder of causes

The Illinois Dram-shop act authorizes the bringing of a several action against each person who violates the act, or the joining in one suit of all persons, whether sellers of intoxicating liquors or the owners of the buildings in which the liquor is sold. But the mere joining of these parties in one suit does not authorize a recovery against all unless their liability is established by proof. The right to join two or more violators of said Act in one suit is merely a question of pleading, and not one of liability to respond in damages.⁴⁷

⁴¹ *Danley v. Hibbard*, 222 Ill. 88 (1906).

⁴² *Eddy v. Courtright*, 91 Mich. 264, 268 (1892).

⁴³ *Helmuth v. Bell*, 150 Ill. 263, 267 (1894).

⁴⁴ *Triggs v. McIntyre*, 215 Ill. 369, 276 (1905).

⁴⁵ *Earp v. Lilly*, 217 Ill. 582, 587 (1905).

⁴⁶ *Merrinane v. Miller*, 157 Mich. 279, 282 (1909).

⁴⁷ *Hedlund v. Geyer*, 234 Ill. 589, 591 (1908).

Under the Civil-Damage law of Michigan two different saloon keepers and the bondsmen of each may be joined in one action, where several persons, by selling or furnishing liquor, contribute to an intoxication which results in actionable injuries;⁴⁸ or the action may be brought against a surety alone.⁴⁹

1315 Declaration requisites, joint liability

The owner of the premises in which intoxicating liquors are sold unlawfully may be charged jointly with the seller of the liquors in an action brought against them jointly.⁵⁰

1316 Brother's intoxication, Narr. (Ill.)

For that whereas the plaintiff is the sister of one N, who died as hereinafter mentioned, and for a long time past, to wit, years, has been infirm and of delicate health and unable to earn a livelihood for herself, and was supported by, and depended for her support on said N at the time of the committing of the grievances hereinafter mentioned and for a long time, to wit, years, prior thereto, and the said N for a long time before the committing of the grievances hereinafter mentioned was engaged in the book binding and stationery business and derived therefrom a large yearly income, to wit, the yearly sum of (\$.....) dollars, and was also possessed of moneys and property amounting in value to a large sum of money, to wit, the sum of (\$.....) dollars, and by means thereof was enabled to and did provide a comfortable and liberal maintenance as well for himself as for the plaintiff. And the said C D, on, to wit, the day of, 19.., in the city of, county of, and state of Illinois, in a certain building and premises known as, to wit, number, street, by him then and there occupied, did carry on and conduct the business of a dram-shop, and the said K during a long period, to wit, years, before that time and then being the lessor of the said building and premises, and having knowledge that intoxicating liquors were to be and were being sold therein, there permitted the occupation of the said building and premises by the said C D for such purpose.

And on the day aforesaid and on divers other days during a period of, to wit, years before said day, the said C D there sold and gave intoxicating liquors to the said N, and thereby caused him, the said N, to become, and he during that time there was from time to time intoxicated; and so being from

⁴⁸ Franklin v. Frey, 106 Mich. 76 (1895).

⁴⁹ Seahill v. Aetna Indemnity Co., 157 Mich. 310, 311 (1909).

⁵⁰ Helmuth v. Bell, 150 Ill. 266.

time to time intoxicated, he, the said N, in consequence thereof, during the time last aforesaid, there wasted and squandered all his moneys and property, and became greatly impoverished, reduced and degraded, and wholly ruined, as well in his mind and body as in his estate, and neglected and ceased to exercise, or attend to the duties of his aforesaid business and calling, or any other business or calling whatsoever, or in any manner to earn or provide a livelihood for himself or for the plaintiff; and in further consequence of the intoxication of the said N, as aforesaid, so by the defendant caused as aforesaid, he, the said N, on, to wit, the day of, 1...., aforesaid, there died. By means of which premises the plaintiff has been and is injured in her means of support, and deprived of the same. Wherefore, the plaintiff says that she is injured and has sustained damages to the amount of (\$.....) dollars, and that by the force of the statute in such case made and provided an action has accrued to her to demand and have of the defendants said sum of money; therefore the plaintiff brings her suit, etc.

1317 Husband's intoxication, Narr. (W. Va.)

For this, that the plaintiff was on the day of, 19.., the lawful wife of, and had been his lawful wife for a long time prior thereto, and continued to be the lawful wife of the said up until the day of, 19.., when he lost his life as a consequence of the unlawful acts of the said defendant, as hereinafter set forth, and that prior to the said day of, 19.., the said, her husband, had become addicted to drinking intoxicating liquors to excess, and prior to the said last mentioned day, and thence thereafter until his said death occurred, the said, had formed and acquired the habit of drinking liquors to intoxication; that on the said day of, 19.., the defendant was engaged in the business of selling intoxicating liquors in the town of, in said county, having a state license so to do, and had been engaged in said business at said place, for about years prior to said day, and is still engaged therein, having all that time such a license; that long prior to the said day of, 19.., the said defendant began to furnish and sell to the said intoxicating liquors and from the said day of, 19.., and up until the death of the said, continued to sell to the said such intoxicating liquors while the said was in the habit of drinking to intoxication as aforesaid, and also sold the said such intoxicating liquors, within the period aforesaid, when he was in an intoxicated condition; and the plaintiff says that all the time aforesaid, when the said

defendant was so furnishing the said intoxicating liquors as aforesaid, and while he was in the habit of drinking to intoxication, and was intoxicated, the said defendant had reason to believe, and in fact knew that the said was intoxicated and in the habit of drinking to intoxication; but the said defendant, notwithstanding that he had reason to believe and knew that the said was in the habit of drinking to intoxication, on the day of , 19.., and after the said defendant had the information aforesaid, he the said defendant, in total disregard of his legal duty under his said license, sold and furnished the said intoxicating liquors, and continued to make such sales and to so furnish him with such intoxicating liquors from said last mentioned day up until his said death, and that too while the said was intoxicated and in the habit of drinking to intoxication, whereby and in consequence of such sales and furnishing intoxicating liquors to the said , the said became and was greatly intoxicated; and while so intoxicated, the said neglected his work, and squandered his money, and thereby injured the plaintiff in her means of support; and also while so intoxicated injured the said plaintiff in her person, in this: that he abused, cursed, ill-treated and threatened the life of the said plaintiff and caused her great humiliation and grief; and all in consequence of the unlawful acts of the said defendant in furnishing and selling to the said intoxicating liquors aforesaid, whereby the said plaintiff's husband became and was intoxicated as aforesaid.

And thereupon the said plaintiff says, that by reason of the aforesaid premises, an action hath accrued to her, to demand and have of and from the said defendant, for and by reason of the said grievances, wrongs and injuries, damages to the amount of (\$.) dollars. And therefore she sues.⁵¹

1318 Parent's intoxication, Narr. (Ill.)

For that whereas the plaintiffs, on and before the day of , 19.., in the said county, were the children of one J H and M H, his wife, the said being on the day aforesaid about years old, being about years old, and being about years old.

And the plaintiffs aver that the said J H, on the day last aforesaid and for a long time next preceding that day, was by trade a carpenter and about the age of, to wit, years, and on or about, to wit, day of , 19.., was strong in body and capable of earning a large yearly income

⁵¹ Pennington v. Gillaspi, 63 W. Va. 541 (1908).

by his trade, to wit, the yearly sum of (\$.....) dollars; and on the day of, 19..., and on many and divers other days prior thereto for a long period of time, to wit, for a period of years, the defendant, O G, with knowledge that the said J H was then and there intoxicated, and a person who was in the habit of becoming intoxicated, at divers places in said county, in wilfull disregard of the rights of the plaintiffs herein, sold and gave intoxicating liquors which caused the intoxication, in whole or in part, of the said J H, and whereby he became and then and there was intoxicated; and in consequence thereof said J H then and there wasted and squandered all his means and property and became greatly impoverished, reduced, degraded and wholly ruined, as well in his mind and body as in his estate and capability for work, and lost his means of securing work at his said trade and neglected and ceased to exercise and attend to the duties of his said trade, or in any manner to provide a proper livelihood for the plaintiffs herein, his said children.

And the plaintiffs further aver that certain other of said defendants, to wit, E U and J S, a corporation, then and there owned and rented, leased or permitted the occupation of certain saloons or dram-shops on premises other than those occupied by the defendant, O G, aforesaid, having knowledge that intoxicating liquors were to be sold therein and knowingly permitted therein the sale and gift by certain persons, to wit, their tenants, of intoxicating liquors which caused the intoxication, in whole or in part, of the said J H, as aforesaid; that at the time of the said sales and gifts the said J H was a person in the habit of becoming intoxicated and often was intoxicated when he drank said intoxicating liquors as aforesaid; that the premises then and there owned and rented, leased and permitted to be used for saloons by defendants E U and J S were known and described as, to wit, (Insert legal description); that one L was in possession of the aforesaid premises as the tenant of said defendants during the period between and, and then and there sold and gave certain intoxicating liquors that caused, in whole or in part, the intoxication of J H, as aforesaid; and that the aforesaid sales and gifts were made on the aforesaid premises repeatedly, frequently and habitually, to wit, daily throughout said period.

And the plaintiffs further aver that because of the said intoxication of the said J H, he, the said J H, then and there failed to furnish and provide them with sufficient and proper food, lodging and shelter and clothing.

By means of which premises hereinbefore set forth the plaintiffs and each of them have been and are injured in their means of support, to wit, the services and earnings of the said J H have been diminished and they have been deprived, among other things, of their sufficient and proper food, clothing and lodging or shelter. Wherefore, etc.

1319 Son's intoxication, Narr. (Ill.)

For that whereas, heretofore, to wit, on, and on, to wit, divers other days, and at divers other times between that date and the commencement of this suit, at and within the county of, in the state of Illinois, the defendants,, and, in certain buildings then and there occupied by them respectively, did sell and give intoxicating liquors to one, and thereby caused the said then and there to become habitually intoxicated, and the said, by reason thereof, was, during all the times aforesaid, habitually intoxicated.

And the plaintiff further avers that at and during all the times aforesaid, the defendants, and, were the owners of the building and premises so occupied by the said, and permitted the occupation of the said building and premises so owned by them, by the said, then and there knowing, during all the times aforesaid, that intoxicating liquors were to be sold therein.

And the plaintiff avers that the said is the son of the plaintiff, and that the plaintiff, during all the times aforesaid, was a widow, and a poor person without adequate means of support, and that she and her said son, during all the times aforesaid, were then and there living together, and that he was of age, and able, competent and willing to earn a living for the plaintiff, and would have done so but for his said habitual intoxication, and that by reason of such intoxication, caused as aforesaid, the said has been broken down and ruined physically and otherwise, and incapacitated for earning money for the plaintiff's support, and that, by reason of the foregoing premises, the plaintiff has been injured in her means of support, and that she has been compelled to support her said son, and during all the times aforesaid her said son wasted and squandered her means and property, of the value of, to wit, dollars, by reason of his said habitual intoxication, by reason of which premises the plaintiff has been injured in her property.

2. And whereas also the defendants, and, during all the times aforesaid, had the right to rent and permit the occupation of the building so occupied by the said, and did, during all the times aforesaid, knowingly permit the said to occupy the said last named building, for the purposes of a saloon, in which to sell intoxicating liquors, then and there, during all the times aforesaid, knowing that intoxicating liquors were to be sold therein.

And the plaintiff avers that the said and the plaintiff were living together during all the times aforesaid, and that the said was able, competent and willing to earn a living for the plaintiff, and would have done so but

for his said habitual intoxication, but that, because of his said habitual intoxication, caused as aforesaid, he was broken down and ruined physically, during all the times aforesaid, and incapacitated for earning money for the plaintiff's support; that the said, during all the times aforesaid, and in consequence of his said habitual intoxication, caused by the defendants, as aforesaid, was unable to earn a livelihood either for the plaintiff or for himself, but was wholly dependent and helpless in this regard, and for the reasons aforesaid, and during all the times aforesaid; that the said, during all the times aforesaid, was unmarried, and had no child or children, and that his father, the plaintiff's husband, had died prior to the dates and times above mentioned; that the plaintiff, during all the times aforesaid, being required by the statute in such case made and provided to support her said son as a poor person, as aforesaid, did in fact support her said son during all the times aforesaid, furnishing him food, clothing, medicine and other necessities, and that, in so doing, she paid out and expended for the necessary support of her said son a large sum of money, to wit, the sum of dollars; and the plaintiff avers that, during all the times aforesaid, she was a person of limited means, owning her home, but having no other property whatsoever except the sum of dollars, which she had received as insurance on the life of her husband, and which would have yielded her a small income if she had been able to retain it, but which she was forced to pay out and expend, and did pay out and expend, in the necessary support of her said son for the reason and under the circumstances hereinbefore stated; and the plaintiff avers that she had no other means or source of income, during all the times aforesaid, and has none now, except as hereinbefore stated, and that she is impoverished and destitute because of the aforesaid premises; and so the plaintiff says that, by reason of all the aforesaid premises, she has been and is injured in her means of support. To the damage, etc.

LIBEL

1320 Malice, proof

Publications of libel or other than those counted upon, if bearing upon the question of malice, are admissible in evidence in an action for libel.⁵²

1321 Joinder of counts

A material alteration in the words published make a different libel, for which a suit is maintainable or upon which a count may be joined.⁵³

⁵² Whittemore v. Weiss, 33 Mich. 348, 352 (1876).

⁵³ Ball v. Evening American Publishing Co., 237 Ill. 592, 606 (1909).

1322 Declaration requisites, innuendo

In an action for libel upon words which are not libelous *per se*, the declaration must bring out the latent injurious meaning of the words charged by proper innuendo, unless the libelous meaning of the words are so clear without an innuendo that a man of common understanding may consider them such without difficulty or doubt.⁵⁴ Words published or spoken which do not refer to the plaintiff by name should be averred that they were spoken or published of and concerning the plaintiff.⁵⁵

1323 Campaign contribution sought by official, Narr.

For that whereas the plaintiff is and ever has been a good and lawful citizen, and until the happening of the grievances hereinafter mentioned has always been considered an upright and honorable man; and whereas the plaintiff has been since the day of, and now is the for the district of, which said office he holds by virtue of an appointment by the president of the United States, by and with the advice and consent of the senate of the United States; and whereas, as such it is the plaintiff's duty to present to the grand jury in and for said district of all violations committed in said district of the laws against crimes and misdemeanors in force in said district, and to prosecute before the courts of said district in the name of the United States all persons charged with the violation of any of said laws; and whereas, the, a body corporate, owns a race track or course in said district of, whereon there are held contests of speed between horses, which said contests are commonly known as horse races; and whereas, at the time of the grievances hereinafter complained of, the said body corporate was duly having take place at its race track or course aforesaid, contests, or races aforesaid, the same commencing the day of and continuing daily since until the date of the grievances hereinafter complained, and advertised to continue until the day of, a period of weeks, which said period is known as said body corporate's; and whereas during such contests divers persons congregate in, around and about said race course or track and make bets or lay wagers upon the result of said races; and whereas if such laying of bets or making of wagers at such race course or track constitutes a violation of any of the laws in force in the district of, it is the duty of the plaintiff to present the per-

⁵⁴ Bourreseau v. Detroit Evening Journal Co., 63 Mich. 425, 429 (1886).

⁵⁵ Ball v. Evening American Publishing Co., 237 Ill. 599, 600.

sons laying such bets or making such wagers to the grand jury of the said district for indictment for such violation; and whereas, the plaintiff did, on, to wit, day of, present to the grand jury one and charged that said, in taking wagers at said race track or course, was setting up a gaming table contrary to the statutes in force in said district against setting up gaming tables, and said grand jury, on, to wit, the day of, returned and presented to the court of the district of an indictment against said, charging him with a violation of said statute, to which said indictment said, on, to wit, the day of, interposed a demurrer, which said demurrer was sustained, on, to wit, the day of, by justice of said court of the district of presiding in the criminal branch of said court, said justice holding that said laying of bets or making of wagers at said race course or track was not a violation of any law in force in said district; and whereas, the plaintiff, as such, as aforesaid, is now engaged in prosecuting an appeal from said decision of said justice to the court of appeals of said district of, for the purpose of having said court determine whether such laying of bets or making of wagers, at said race track or course, is unlawful and contrary to the statutes of the district of against crimes or misdemeanors; and whereas, pending said determination of said question by said court of appeals, the plaintiff, conforming himself as it is his duty to do to the law as judicially considered, as aforesaid by the justice of the said court of the district of, has not ordered the issuance of warrants for the arrest of, or presented to the grand jury of said district, any persons for laying bets or making wagers on said contests at said race course or track as aforesaid; and whereas the said defendant aforesaid,, was, at the time of the grievances hereinbefore mentioned, and now is, the publisher of a certain paper in the city of, said paper being called; and whereas one was, at the time of the grievances hereinafter mentioned, and still is, a candidate for nomination by the party for the office of; and whereas, the said defendant,, has been publishing in its said paper, the, for many days previous to and since the date of the grievances hereinafter complained of, numerous articles or advertisements in support of the said candidacy of the said; and whereas, the said defendant,, in addition to publishing the said paper, has sold and circulated the same in the city of, and in the district of, and throughout the whole of the United States of America, in American countries adjacent thereto, and in foreign countries; and whereas,

notwithstanding the fact that the said plaintiff has always conducted himself as an honest, upright citizen and has always properly conducted himself in his said office as for the district of, heretofore mentioned; and whereas, the said plaintiff has heretofore and now is performing the duties as for the district of in an upright, honest and dignified manner; yet, the said defendant,, well knowing the premises, but maliciously, wickedly and fraudulently contriving to injure the plaintiff in his good name, fame and credit, and to bring scorn, public scandal and disgrace upon him, and to injure him in his office as for the district of, aforesaid, did heretofore, to wit, on the day of, compose and publish and cause to be composed and published, of and concerning the said plaintiff, and of and concerning the said office of the said plaintiff in the said newspaper called of, date, to wit,, the same being published in the city of, district of, and widely circulated among the people of the whole United States and in the countries aforesaid, and particularly in the said city of, district of, a certain false, scandalous, malicious and defamatory libel of the tenor following, to wit: "..... political contest." (meaning thereby the contest of said for said nomination for the office of, aforesaid). "....." (meaning thereby) said in his great onslaught on Mr. (meaning the said) a few days ago: 'I regard his candidacy as a joke. If I had a monkey and hand wagon, I could get up a crowd anywhere.)

"This was a fine expression for a statesman (meaning said), by not wanting in dignity so much as a justice, etc., (meaning thereby the honorable), who, with (meaning the plaintiff), went to (meaning the town of), the last (meaning the day of) to attend a conference of (meaning said) enemies and determine upon what ammunition was needed to defeat him. The question now is, where does the money come from in the contest against Mr.? (meaning the said). How about the race track?"

Meaning thereby and intending to convey and actually conveying that the said plaintiff entered into a conference with the said and other persons at the town of, at the time mentioned, for the purpose of determining what funds were necessary, and how same should be raised, to be used in the campaign on behalf of said against said for the said nomination for the office of, as aforesaid, and that the said plaintiff was obtaining money or funds for uses in said campaign from the said

..... or persons engaged in making bets or laying wagers at the race track or course aforesaid, or from some other person or persons interested in said race track or course, or in laying of bets or the making of wagers at the said race track, or course, as aforesaid; and meaning and intending to convey and actually conveying that the said plaintiff was and is corrupt in the conduct of his official duties as, as aforesaid, in not presenting to the grand jury and prosecuting before the court of said, the person or persons who lay bets or make wagers upon the said contest at the said race track or course, as aforesaid, in consideration of contributions of money for use in said contest against the said, or some company, person or persons who is or are interested in the said race track or course, or contest carried on thereon, or in the laying of bets or in the making of wagers thereon upon said contest. Which said false, scandalous, malicious and defamatory libel was composed and published, and was caused and procured to be composed and published as aforesaid by the said defendant of and concerning the said plaintiff, said defendant meaning and intending thereby to charge that the said plaintiff was a corrupt, dishonest and unworthy person, and was being influenced in the discharge of his duties as by the fact that some person or persons or company, interested in said race track or course, or in the contests thereon, or in having betting, wagering and gambling promoted thereon, was contributing money to be used against the candidacy of the said for the office of By means of which said false and scandalous libel the plaintiff has been and is very greatly injured in his good name, fame and reputation and brought into scorn, scandal, infamy and disgrace in so much as divers good and lawful citizens have, by reason of the grievances aforesaid, suspected and believed and still do suspect and believe the plaintiff to be guilty of the acts set out and charged and intended to be charged in said publication, and to have been guilty of bad and improper conduct so charged of and concerning him, and have, by reason of the committing of said grievances from hence until now, believed the plaintiff to be a dishonest and unworthy person and to have been guilty of the wrong alleged of him as, to the damage, etc.

1324 Financial responsibility, Narr. (Md.)

For that the plaintiff is engaged in business in the city of, in the state of, as a maker and dealer in machine and hand cut corks, and imported and domestic bottles, demijohns, flasks, bottle caps, straw covers, brewer's and bottler's materials and supplies, and has been engaged in said business in said city upon his own account ever since the year That the defendants are the district manager and assistant manager respectively of a firm

known as company, which firm conducts a mercantile agency with branches throughout the United States, and publishes and circulates among its several thousand subscribers a certain book or list of commercial ratings in which are printed the names and occupations of persons, firms and corporations engaged in commerce in the several states and cities of the United States, said names being arranged in geographical and alphabetical classification, which makes the said book a means of ready references; that alongside the names published in the said book or list of commercial ratings there appear certain letters and numerals, which, according to the key published at the beginning and at the end of said book, furnish a designation of the financial worth and reliability as to credit and character of the persons beside whose names the said letters and figures appear; and the said firm of company in the conduct of its business places copies of its said book or list of commercial ratings with all its subscribers throughout the world.

And the plaintiff says that after he went into business on his own account in the year, as aforesaid, he was for many years a subscriber to the said book or list of commercial ratings, and paid the said company, through its agents, the defendants, an annual sum of from to dollars therefor, and that during the time when the plaintiff was such a subscriber he was rated in said book or list of commercial ratings as having a financial worth of from to dollars, and as enjoying high credit; but that after the plaintiff ceased to subscribe for the said book or list, and to pay the said annual sum of from to dollars, although the plaintiff's financial worth and reputation for business honesty remained as great as it had been prior thereto, and in fact increased by reason of the plaintiff's strict attention to business, nevertheless, the defendants maliciously and without just cause therefor procured the said firm of company in their edition of the said book or list of commercial ratings published in the month of, 19.., to print the plaintiff's name without any letter or figure of any kind whatever standing alongside of it, the same being what is designated in trade circles as a "blank rating;" that such "blank rating," according to the aforesaid key published at the beginning and at the end of said book, is purported to be explained by the following words contained in the said key printed as aforesaid, to wit, "The absence of a rating, whether of capital or credit, indicates those whose business and investments render it difficult to rate satisfactorily. We, therefore, prefer in justice to these to give the detailed reports on record at our offices." But that the common acceptance in the trade and among the many thousands of subscribers to the said book or list of commercial ratings throughout the United States of such a blank rating, even though the same is purported to be explained and modified by the said explanatory statement published in

said key, is that the person so rated blank is worthless as to his financial condition, untrustworthy as to his character, and utterly unworthy of credit in any commercial transaction.

And the plaintiff further says that the defendants falsely and maliciously and in order to punish the plaintiff for having refused to continue to subscribe for the said book or list of commercial ratings, and for having refused to pay an annual tribute of from to dollars aforesaid, and with the malicious intent to injure the plaintiff in his trade or calling, and to break up and destroy the plaintiff's business and deprive him of the means of a livelihood did, although knowing full well that the common acceptance in the trade and among the thousands of subscribers to the said book or list of commercial ratings throughout the United States of such a blank rating purported to be explained and modified by the said explanatory statement published in said key is that the person so rated blank is worthless as to his financial condition, untrustworthy as to his character, and utterly unworthy of credit in any commercial transaction, cause the publication of the plaintiff's name in said book or list of commercial ratings with a blank rating as aforesaid, meaning and intending to publish the plaintiff as a person who is worthless as to his financial condition, untrustworthy as to his character, and utterly unworthy of credit in any commercial transaction.

And the plaintiff further says that the publication of the said libel has utterly destroyed the credit which the plaintiff has heretofore enjoyed, and has caused many of the persons, firms and corporations from whom the plaintiff has been purchasing goods to demand immediate payment of the balance due them, and to refuse to sell the plaintiff goods upon the usual terms of credit heretofore allowed, so that the plaintiff who but for the publication of said libel would be in a better condition financially than he has ever been, is seriously injured in his business, and has suffered and will suffer a heavy loss and damage in the prosecution thereof; and that said business has been worth more than dollars per annum to the plaintiff for a long period of years.

And the plaintiff claims dollars.

1325 Hatred, contempt and ridicule, action

An action for libel is maintainable for a wrongful and malicious publication of words which tend to bring a party into public hatred, contempt or ridicule, although the same words, if spoken, would not be actionable.⁵⁶

⁵⁶ *Cervený v. Chicago Daily News*
Co., 139 Ill. 345, 354 (1891).

1326 Hatred, contempt and ridicule, Narr. (Ill.)

For that whereas, before and at the time of the committing by the defendant of the several grievances hereinafter mentioned, said plaintiff was a person of good name, credit and reputation in the county of, and state of Illinois, and before and at the time of the committing by the defendant of the several grievances hereinafter mentioned, carried on, and still does carry on, the trade and business of a merchant in the city of, in said county of, and was deservedly held in esteem by his neighbors and those with whom he had dealings in his trade and business as such merchant, whereby he acquired great gains in his trade and business; and whereas, before and at the time of the committing by the defendant of the several grievances hereinafter mentioned, the plaintiff was held in high esteem by his neighbors and acquaintances, as a patriotic, law-abiding and law-respecting citizen of said county, and as to his political views, tenets and opinions he was, and for a long time prior thereto had been, a member and adherent of the party, and had obtained and received the nomination as a candidate for the office of of said county by the regular and general nominating convention of said party of the said county of, held in, in said county, on the day of,, and thereby became and was a candidate for said office of on the regular ticket of said party at the general election held in said county on the day of,

And the said plaintiff, for a further statement of extrinsic facts bearing upon the grievances hereinafter mentioned and complained of, further avers that on and prior to the day of, 19.., there was in said county of, and elsewhere throughout the United States, and ever since that time has been and still is, a large number, class, sect or party of persons commonly called, known and designated as "anarchists;" that on said day of, 19.., a great riot occurred in the city of, in said county of, now commonly known as the "..... riot," in which riot one, a policeman of said city of, was, as was then and ever since that time has been and still is commonly understood and believed, killed by a dynamite bomb thrown by some person into the midst of a company of policemen of the said city of, then and there being, and as a result of the explosion of said bomb, and the firing of pistol shots then immediately following, a large number, to wit, other of said policemen, were killed, and a large number, to wit, of said policemen, were wounded; that it was then and ever since that time, has been and still is, commonly believed in said city of

....., and in said county of, and elsewhere, that said riot and murder were immediately and remotely instigated, caused and brought about by said class and party of persons then and ever since then and now generally known and designated in said city and county as anarchists, and by certain leaders and prominent and representative men in said class or party of persons called anarchists, as aforesaid; and it was then, and ever since that time has been and is now, commonly understood and believed in the city and county aforesaid, that said riot and murder were the natural result of the doctrines and teachings of said class, party or sect called anarchists, as aforesaid, and that the doctrines, opinions, beliefs, teachings and tenets of said class, party or sect called anarchists, as aforesaid, and of the persons composing said class, party or sect, is, that the law and order of society then, and ever since then and now, existing, should be overthrown by revolution and force.

And the plaintiff further avers that after said riot and murder of the prominent leaders of said class, party or sect called anarchists, to wit,, were indicted by the grand jury of said county for murder, to wit, the murder aforesaid, and thereupon such proceedings were afterward had in the criminal court of said county that all of said persons above named were adjudged guilty of murder, and in pursuance of the judgment of said criminal court the said suffered the penalty of death by hanging, and in pursuance of said judgment the said were committed to the penitentiary of the state of Illinois.

And the plaintiff further avers that said riot has been, ever since its occurrence, commonly known in said city and county as the riot of the anarchists; and that said trial of said persons was at the time thereof, and ever since that time has been and still is, commonly known in said city and county as the trial of the anarchists; and the hanging of said persons above named was then, and ever since that time has been and now is, in like manner commonly known and spoken of as the hanging of the anarchists.

And the plaintiff further avers, that the name, term and designation of anarchist ever since said riot, trial and hanging, has been and still is commonly understood and regarded in said city and county, and elsewhere, as descriptive of one who holds and entertains opinions and doctrines opposed to the maintenance of law and order and subversive of government, and similar in that regard to the opinions and doctrines entertained and acted upon, as aforesaid, by said

And the plaintiff further avers, that ever since said riot, trial and hanging, the name and designation of anarchist applied to any person has tended, and still tends, to expose such persons to public hatred, contempt and financial injury; yet, the defendant, well knowing the premises, but contriving and wrongfully and maliciously intending to injure and destroy the good name

and reputation of the plaintiff as a law-abiding and order-loving citizen of the community in which he lives, to wit, in the city and county aforesaid, and to injure him in his said business, and to bring him into public hatred, contempt, ridicule and financial injury, on the day of, 19., in the county aforesaid, wickedly and maliciously did compose and publish, and did cause to be composed and published, of and concerning the plaintiff, and of and concerning the plaintiff as a candidate for said office of, in a certain newspaper called ".....," whereof the said defendant was then and there the proprietor, a certain false, scandalous, malicious and defamatory libel, containing, among other things, the false, scandalous, malicious, defamatory and libelous matter following, of and concerning the plaintiff, that is to say: "..... (meaning the plaintiff) is an anarchist, hot-headed and fiery." "It was said yesterday that a committee of had gone to see (meaning the plaintiff), and was received by him (meaning the plaintiff) in a room with pictures of (meaning the said above mentioned) and the other executed anarchists," (meaning the said who were hung for murder as aforesaid.) "This did not satisfy the, and they were imprudent enough to complain about,," (meaning the plaintiff), meaning and intending thereby to charge the plaintiff with being a member of said class, party or sect of persons called anarchists, and that the plaintiff entertained and held to the aforesaid doctrines, views and tenets of said class, party or sect called anarchists, and that the said plaintiff held to the teachings of said executed anarchists with regard to law and government, and that the plaintiff was in accord with the doctrines and cherished the memory of said executed revolutionists and murderers, and that said plaintiff was a person who entertained opinions and doctrines opposed to the maintenance of law and order and subversive of government, and in favor of the overthrow of society as then existing, by revolution and force.

2. And also for that whereas, afterwards, to wit, on the day of, 19., in the county aforesaid, the said defendant, well knowing the premises aforesaid, and further contriving and wrongfully and maliciously intending to injure and destroy the good name and reputation of the plaintiff as a law-abiding citizen in the community in which he resided, to wit, in the city of and county ofaforesaid, did compose and publish, and did cause to be composed and published, of and concerning the plaintiff, and of and concerning the result of said election, and of and concerning the plaintiff as candidate at said election, in said newspaper called ".....," whereof the said defendant was there and then the proprietor, a certain other false, scandalous, malicious and defamatory libel, containing, among other

things, the false, scandalous, malicious, defamatory and libelous matter following, of and concerning the plaintiff, as aforesaid, that is to say: "But (meaning the plaintiff) was voted against because he is an anarchist. This is disclosed by the returns from the wards. Here are three wards. Their vote indicates somewhat the temper of the party (meaning the party) towards (meaning the plaintiff). (Insert returns) These figures show that ran nearly votes ahead of (meaning the plaintiff) in these wards." Meaning and intending to charge that said plaintiff was then, to wit, at the time of and before said election, a member and adherent of said party, sect or class of persons then commonly known and designated as anarchists, as aforesaid, and that he, the said plaintiff, was defeated at said election, and ran behind the other candidates on said ticket at said election, because he, the said plaintiff, was an anarchist; and meaning and intending to charge that the plaintiff was a person who entertained opinions and doctrines opposed to the maintenance of law and order and subversive of government, and in favor of the overthrow of society as then existing, by revolution and force.

By means of the committing of said several grievances by the defendant, the plaintiff has been and is greatly injured in his good name, credit and reputation, and has been brought into public scandal and disgrace; and also by means of the premises, the plaintiff has been and is otherwise injured, to the damage of the plaintiff of dollars, and therefore he brings suit, etc.⁵⁷

1327 Minister's conduct, Narr.

For that whereas the plaintiff is and ever has been a true, honorable, pure and moral person faithful and honest in his profession and business and upright in his conduct, and is and always has been wholly free from false, dishonorable, impure, immoral purposes and acts, or any offense, or offenses of like character, and until the committing of the grievance hereinafter complained of, was reputed, and deservedly so, to be a person of good name and reputation in the United States and foreign countries, and was in good standing and repute in the ministry of the Gospel in which calling or profession he was engaged and in business of writing, editing and publishing religious papers, pamphlets and books, which said religious papers, pamphlets and books have a large circulation and sale in the United States and foreign countries and from which sales an income was and is derived with certain divers emoluments and gains with which to carry on the work of the plaintiff.

⁵⁷ *Cerveny v. Chicago Daily News Co.*, 139 Ill. 345, 351.

Yet the defendant, well knowing the premises, but contriving to deprive the plaintiff of his good name, reputation and professional and business standing, and to bring him into scandal and disrepute among his friends, neighbors, associates, acquaintances, patrons, customers, and with the public, and to injure him in his said calling, profession, occupation, business and pursuit, and to harass and discredit, impoverish and disgrace him and bring him to ruin, did heretofore, to wit, in the month of on or about the day of, of said month falsely and maliciously compose and publish of and concerning the plaintiff, in a certain newspaper published by the defendant in the city of, to wit, the which newspaper then had a large circulation throughout the, and the states of,,,, and elsewhere throughout the United States and foreign countries, the following false, scandalous, defamatory and malicious libel, to wit: (Set out article).

And the plaintiff says that the statements and charges contained in said publication against him and the inferences that the plaintiff (State specifically the particular inferences that the libelous matter is susceptible of) and that the statements therein set forth and any and all of them, or the inferences therein contained of false, unseemly, dishonorable, impure, immoral, or criminal purposes, acts, or conduct, or any offense or offenses of like character are absolutely false; that the plaintiff did not use language attributed therein to him nor any language of like or similar import; that the plaintiff was not and is not in any wise guilty of the said offenses so laid to his charge or sought to be imputed to him in and by the said false, scandalous and defamatory publication; and that the said libel by reason of its publication in the said newspaper was circulated and published widely throughout the, the states of,,, and elsewhere throughout the United States and foreign countries; and that by reason of said publication the plaintiff has been greatly hurt and injured in his good name, fame and reputation, and has been brought into disgrace and disrepute among divers neighbors, friends and associates, acquaintances, patrons, customers and among divers other persons, and before the public generally, and has been greatly injured in his said calling, profession and business as a minister of the Gospel, in writing, editing and publishing the religious papers, pamphlets, and books, and his influence has been thereby greatly impaired; and that by reason of the committing of the grievance aforesaid divers good and worthy persons have suspected and believed and still do suspect and believe the plaintiff to have been guilty of false, improper, impure, immoral, and criminal acts and purposes and bad and improper conduct so published of and concerning him, and have by reason thereof, since wholly refused to have

any transaction, acquaintance, association or business transaction with the plaintiff, as they otherwise would have had, to the damage, etc.

1328 Pleadings, libelous matter, action

Alleged libelous matter in a pleading is not actionable, when the matter is not wholly irrelevant and impertinent to the controversy between the parties.⁵⁸

1329 Pleadings, libelous matter, Narr. (Ill.)

For that whereas the plaintiff now is a true, honest and faithful citizen of the state of Illinois, and as such has always behaved and conducted himself, and until the committing of the grievances by the said defendant as hereinafter mentioned, was always reputed, esteemed and accepted by and among all his neighbors and other worthy citizens of this and other states, to whom he was in any wise known, to be a person of good name and credit, to wit, at the said county of By means of which said premises, the said plaintiff before the committing of the said grievances by the said defendant as hereinafter mentioned had deservedly obtained the good opinion and credit of all his neighbors and other citizens to whom he was in any wise known, to wit, at the county of aforesaid. And for that whereas the plaintiff before and at the time of the committing of the grievances by the said defendant, as hereinafter mentioned, was and from thence hitherto has been and now is the president of S, a corporation organized and doing business under and by virtue of the laws of the state of And before and at the time aforesaid the said corporation exercised and carried on, and does now exercise and carry on the business of manufacturing, at, to wit, the county of and state of And plaintiff had conducted the said business of said corporation with punctuality in its dealings, keeping its engagements, paying its debts, and in such a business-like manner as to place said corporation among the stable and prosperous corporations at, to wit, the county aforesaid; and by reason of the premises the said corporation was doing a large and successful business, and the plaintiff, as president thereof, was thereby daily and honestly acquiring great gains and emoluments in said trade. And the defendant from thence hitherto was, and is now engaged in the business at, to wit, the said county of, and was and is now a business rival of said corporation and evilly disposed toward said plaintiff. And before the committing of the grievances by the said defendant,

⁵⁸ Ash v. Zwietusch, 159 Ill. 455 (1896).

as hereinafter mentioned, plaintiff had filed in the court of said county and state aforesaid, on the chancery side thereof, a certain bill, known as number of the general numbers of cases in said court, wherein the plaintiff herein was complainant and the defendant herein was defendant, in words following, to wit: (Set out bill *in haec verba*).

And to said bill the defendant in this suit made and filed in that cause his certain answer in words following, to wit: (Set forth answer in full).

Yet, the defendant well knowing the good character of plaintiff, but wickedly and maliciously intending to injure the good name, reputation and credit of plaintiff and to injure the growing trade and reputation of said corporation and to bring plaintiff and said corporation into public scandal, infamy and disgrace among the inhabitants of said county, and to cause it to be suspected that plaintiff had been and was guilty of embezzlement, and for the sole and express purpose of gratifying defendant's malice and ill-will towards plaintiff and to destroy competition in said trade, well knowing that the statements made were wholly impertinent and irrelevant to the material issue in said cause, and entirely foreign and unnecessary as a defense thereto, and that there was no reasonable or probable cause for asserting to be true the said words, on, to wit, the day of,, at, to wit, the said county of, did write, publish and file, and cause to be written, published and filed, in his said answer, and made a part of the public records of said cause, a false, scandalous, malicious and defamatory libel, of and concerning the plaintiff, to wit: "That he (meaning) collected about \$..... belonging to defendant (meaning) and had appropriated the same to his own use (meaning use) without the consent or knowledge of the defendant (meaning said);" and the defendant in addition to said false and defamatory words last aforesaid, and in the same answer, further and wantonly, on, to wit, the day and at, to wit, the place last aforesaid, wrote, published and filed, and caused to be written, published and filed in said cause the following false, malicious and immaterial matter, of and concerning the plaintiff, to wit, "until the discovery by the defendant (meaning) of the embezzlement by complainant (meaning) of a large sum of money." And the plaintiff avers that by the publishing and filing of said words in said answer the defendant meant and intended falsely and maliciously to charge the plaintiff with the crime of embezzlement and to cause it to be suspected by the associates of plaintiff that he had been and was guilty of the crime of embezzlement and was subject to the penalty made and provided by the laws of the state of Illinois therefor. And the plaintiff further avers that the matters above alleged are false and

defamatory, and wholly irrelevant and improper, impertinent and immaterial to the issue between the parties to said bill, and were written, published and filed without any reasonable or probable cause; all of which was known by the defendant at the time of filing the same, and with the express intent on his part to defame the plaintiff. By means of the committing of which said grievances by the defendant, the plaintiff has been and is injured in his good name, credit and reputation and brought to public scandal and disgrace, and has been and is shunned and avoided by divers persons; and has been and is otherwise injured in his said business, to the damage, etc.⁵⁹

1330 Privileged communications, proof

In an action for libel arising from privileged communications the plaintiff must prove the falsity of the contents of the communication and express malice in its publication, without either of which there is no cause of action. In an action for libel which is not privileged, the plaintiff is not bound to prove the falsity of the libel.⁶⁰

MALICIOUS PROSECUTION

1331 Nature and scope

In an action for malicious prosecution, the gist of the action is the concurrence of malice and want of probable cause. The want of either element is fatal to the action.⁶¹ Unless a person has acted maliciously and without probable cause, he is not liable for the bringing of a civil or criminal action and for the wrongful seizure of property thereunder, if the court in which the suit was brought had jurisdiction of the subject matter and the parties.⁶² Malice may be inferred from a want of probable cause; but the absence of probable cause cannot be inferred from malice.⁶³ A prosecution instituted with any other motive than that of bringing a guilty party to justice is malicious as a matter of law.⁶⁴ No action for malicious prosecution is maintainable

⁵⁹ A demurrer was sustained to the foregoing declaration on the ground that the pleadings which were set out in the declaration disclosed no cause of action. *Ash v. Zwietusch*, *supra*.

⁶⁰ *Edwards v. Chandler*, 14 Mich. 471, 475 (1866).

⁶¹ *Jacks v. Stimpson*, 13 Ill. 701, 703 (1852); *Spaids v. Barrett*, 57

Ill. 289, 294 (1870); *McElroy v. Catholic Press Co.*, 254 Ill. 290, 293 (1912).

⁶² *Hill Co. v. Contractors' Supply & Equipment Co.*, 249 Ill. 304, 310 (1911).

⁶³ *McElroy v. Catholic Press Co.*, 254 Ill. 294.

⁶⁴ *McElroy v. Catholic Press Co.*, 254 Ill. 293.

until the suit or the prosecution upon which the action is to be based has legally terminated.⁶⁵

1332 Declaration requisites generally

A declaration for malicious prosecution must aver that the former suit or proceeding was terminated and that such termination was in plaintiff's favor. But a defective averment of the termination of the first proceeding is cured by verdict.⁶⁶ The words "without any reasonable or probable cause" are not indispensable if language is used which has a similar meaning.⁶⁷ In an action against a private individual for false imprisonment the averment of want of reasonable or probable cause is unnecessary; but if such an averment is made, it will be treated as surplusage.⁶⁸ The declaration must particularly specify special damages, if such damages are sought to be recovered.⁶⁹

1333 Abuse of process, action

Liability for an unwarranted use of legal process depends upon whether the process complained of is void or merely voidable. A total absence of evidence as to any essential fact required to be proved to a court of special and limited jurisdiction, as the ground of issuing process, renders the process absolutely void, but when the proof before the court has the legal tendency to make out a proper case, in all its parts, for issuing the process, the process will be valid until it is set aside by a direct proceeding for that purpose, although it may be based upon slight and inconclusive proof.⁷⁰

1334 Abuse of process, declaration, requisites

A declaration based upon a malicious abuse of process must show that legal process was misused after it had issued.⁷¹

⁶⁵ Feazle v. Simpson, 1 Seam. 30 (1832).

⁶⁶ Feazle v. Simpson, *supra*; Spaid v. Barrett, 57 Ill. 294.

⁶⁷ Spaid v. Barrett, 57 Ill. 295.

⁶⁸ Enright v. Gibson, 219 Ill. 550, 556 (1906).

⁶⁹ Horne v. Sullivan, 83 Ill. 30, 31 (1876).

⁷⁰ Miller v. Brinkerhoff, 4 Denio 118, 120 (N. Y. 1847); Johnson v. Maxon, 23 Mich. 129, 136 (1871).

⁷¹ Keithley v. Stevens, 238 Ill. 199, 202 (1909).

1335 Attachment, action

An action on the case is maintainable for maliciously suing out an attachment and seizing the goods of a debtor.⁷²

1336 Attachment, Narr. (Ill.)

For that whereas, at and before the time of the committing of the grievances hereinafter set forth, plaintiff, in said county, was carrying on and was engaged and had been for a long time engaged in the business of, and owned a great stock of merchandise, material, tools, and implements, pertaining to such business, and conducted and carried on his business honestly, and was deservedly held in good credit by the public in general, and his neighbors, and customers, and patrons in particular, whereby, he daily acquired great gains and profits; yet the defendants, well knowing the premises, but wickedly contriving and maliciously intending to injure the said plaintiff in his said business, good name, and fame, and credit did, to wit, on the day of,, cause to be made and filed a certain paper, commonly known as an affidavit in attachment, before a justice of the peace in and for the county of, and state of Illinois, to wit, before, esquire, and then and there caused to be issued out of and obtained from the said justice of the peace, a paper commonly known as a writ of attachment, commanding any constable in the county of, and state aforesaid, to attach so much of the estate, real or personal, of the said above named plaintiff to be found in his county, as should be of value, sufficient to satisfy the debt named in the said writ amounting to dollars, and cents (\$.), and costs alleged to be owing to the said above named defendants, etc., against this plaintiff, and delivered the same to the said constable of said county; whereby, the said defendants,, affirmed and charged that this plaintiff had departed from this state with the intention of having his effects removed from this state, and was about to remove his property from this state to the injury of the said defendants; and this plaintiff in fact says that he had not then and there departed from this state with the intention of having his effects removed from this state, nor was he about to remove his property from this state, to the injury of the said defendants, as above stated; and he in fact says that the said, and his aforesaid co-defendant, and each of them, did not then and there at and before and within the time of the making and filing of the said affidavit, and of the obtaining

⁷² Spaid v. Barrett, 57 Ill. 293;
Thomas v. Hinsdale, 78 Ill. 259
(1875).

of the said writ, and of the delivery of it to the said constable, have probable cause to believe that this plaintiff had departed from this state with the intention of having his effects removed from this state, nor was about to remove his property from this state; and so this plaintiff avers, and charges that the said defendants did maliciously, wrongfully and without probable cause, cause to be made and filed the said affidavit, and to be obtained the said writ and the same to be delivered to the said constable, and by him levied.

And plaintiff, in fact says, that thereupon, to wit, on the day of, the said defendants caused the said writ to be levied, and the said constable did levy said writ upon the goods and chattels, effects, furniture, tools, implements, merchandise, and materials of this plaintiff, and did cause said constable to enter upon the business premises of this plaintiff, and did cause him to possess himself thereof, and he did possess himself thereof, and they did cause him to eject this plaintiff therefrom, and he did eject him therefrom; all of which acts and wrongs he did in pursuance of the said writ, and he did thus and thereby deprive this plaintiff of his personal property of great value, and did damage other of his personal property to a great amount, and did deprive this plaintiff of his place of business, and greatly injure his good name, and credit, and destroy the good will in and to the said business, and did thence until hitherto deprive him of great gains and profits to accrue out of his said business, and did utterly prevent him continuing in his said business, and did cause the same to be wholly lost to him, and did cause him to pay out large sums of money, and to incur large debts in procuring the said attachment to be released, and in recovering and attempting to recover the said goods, and chattels taken under said writ.

And the plaintiff, in fact says that afterwards, to wit, on the day of, by judgment on that day rendered, by the said justice of the peace, the issues upon the said affidavit were found in favor of this plaintiff, and by the final order of said justice of the peace, duly made and entered on that date, which order thence, hitherto has remained in full force and effect, the said writ of attachment was then quashed, and wholly held for naught.

By means of which said several premises, and by the acts and wrongs aforesaid, and by other wrongs and grievances in that behalf then and there by said defendants caused to be wantonly, oppressively, willfully, vexatiously, and maliciously done, this plaintiff sustained damages direct and exemplary in the sum of dollars (\$.....). Therefore he brings this suit, etc.

1337 False imprisonment, action

The assignor of a chose in action is not liable for the wrongful issuance of a *capias* at the instance of the assignee of the right of action, without the assignor's special sanction and authority therefor.⁷³ An action of trespass on the case, and not trespass, will lie for an act done under legal process regularly issued from a court, or by an officer of competent jurisdiction, when there is malice or want of probable cause.⁷⁴ Imprisonment under legal process of a court having jurisdiction of the subject matter cannot be made the basis of an action for false imprisonment against a judge or magistrate who has issued process, the officer who has served it and the party at whose instance the process was issued, when the court or magistrate had merely erred in his judgment as to the sufficiency of an affidavit upon which the process was based.⁷⁵

1338 False imprisonment, Narr. (Ill.)

For that whereas, the plaintiff now is a good and honest citizen of this state, and as such has always behavedsel. . . , and has not ever been guilty, or until the time of the committing of the several offenses and grievances by the defendant. . , as hereinafter mentioned, been suspected to have been guilty of larceny, or any other such crime, by means whereof the plaintiff, before the committing of the said grievances by defendant. . had deservedly obtained the good opinion and credit of all h. . neighbors and other worthy citizens of the state; yet, the defendant. . well knowing the premises, but contriving and maliciously intending to injure the plaintiff. . in h. . aforesaid good name and fame, and credit and to bring h. . into public scandal, infamy and disgrace, and to cause the plaintiff. . to be imprisoned for a long time, and thereby to impoverish, oppress and ruin h. . , did on or about the day of in the town of , in the county and state aforesaid go and appear, before one then and there being one of the justices of the peace in and for the county aforesaid, and then and there, before the said , so being such justice as aforesaid, falsely and maliciously, and without any reasonable or probable cause whatsoever charge the plaintiff. . with having feloniously stolen certain articles of personal property described in the aforesaid

⁷³ *Park v. Toledo, Canada Southern & Detroit R. Co.*, 41 Mich. 352, 355 (1879).

⁷⁴ *Blalock v. Randall*, 76 Ill. 224,

228 (1875); *Paulus v. Grobben*, 104 Mich. 42, 49 (1855).

⁷⁵ *Feld v. Loftis*, 240 Ill. 105, 107 (1909).

complaint then and there made by the defendant.. as follows, to wit: (Describe goods), the property of the defendant.. and upon such charge the defendant.. falsely and maliciously and without any reasonable or probable cause whatsoever, caused and procured the said so being such justice aforesaid, to make and grant his certain warrant, under his hand and seal for the apprehending and taking of the plaintiff.., and for bringing the plaintiff.. before him the said or some other justice of the peace in and for the said county, to be dealt with according to law for the said supposed offense; and the defendant.., under and by virtue of the said warrant, afterwards, to wit, on the day of, aforesaid, there wrongfully and unjustly, and without any reasonable or probable cause whatsoever, caused and procured the plaintiff.. to be arrested by ..h.... body, and to be imprisoned, and kept in prison for the space of hours then next following, and until ..h.... the defendant.. afterwards, to wit, on or about the day of, there falsely and maliciously and without any reasonable or probable cause whatsoever, through and by virtue of said warrant caused and procured the house and domicile of this plaintiff.. to be entered by an officer of the law and by him searched, and divers of ..h.... goods and property were then and there taken by said officer, and carried away and brought before the said justice as aforesaid.

And the defendant.. afterwards, to wit, on or about the day of, without any reasonable or probable cause whatsoever caused and procured the plaintiff to be carried in custody before the said so being such justice as aforesaid, to be examined before the said justice, touching the said supposed offense; whereupon, the plaintiff then and there prayed a change of venue from the said justice aforesaid to the next nearest justice of the peace in the town and county aforesaid; and the defendant.. afterwards to wit, at the time aforesaid then falsely and maliciously, and without any reasonable or probable cause whatsoever caused and procured the plaintiff to be carried in custody before, a justice of the peace in and for the county aforesaid, he, the said justice being the next nearest justice of the peace in the town and county aforesaid to be examined before the said justice aforesaid, touching and concerning the said supposed offense; which said justice having heard and considered all that the defendant.. could say or allege against the plaintiff touching and concerning the said supposed offense and all that the defendant.. could say or allege touching and concerning the divers goods and property so taken as aforesaid, then and there adjudged and determined that the plaintiff was not guilty of the said supposed offense, and then and there caused the plaintiff to be discharged out of custody, fully acquitted and discharged

of the said supposed offense, and then and there adjudged and determined that the divers goods and property so taken as aforesaid belonged to the plaintiff, and the said divers goods and property were by the said justice ordered restored to the plaintiff; and the defendant.. ha.. not further prosecuted ..h.... said complaint, but ha.... abandoned the same and the said complaint, and prosecution are wholly ended and determined.

By means of which premises, the plaintiff has been and is greatly injured in ..h.... credit and reputation, and brought into public scandal, infamy and disgrace, with and among all ..h.... neighbors and other worthy citizens of this state; and divers of those neighbors and citizens, to whom ..h.... innocence in the premises was unknown, have on occasion of the premises, suspected and believed, and still do suspect and believe that the plaintiff has been and is guilty of larceny; and also the plaintiff has, by means of the premises suffered great anxiety and pain of body and mind, and has been obliged to lay out, and has laid out divers large sums of money, amounting to dollars, in and about the procuring of ..h.... discharge from the said imprisonment, and the defending ofsel.... in the premises and the manifestations of ..h.... innocence in that behalf; and has been greatly hindered and prevented by reason of the premises, from following and transacting ..h.... affairs and business, for the space of; and also, by reason of the premises the plaintiff has been and is otherwise greatly injured in ..h.... credit and circumstances. To the damage, etc.

(Maryland)

For that heretofore, to wit, on or about the day of, 19.., the defendant falsely and maliciously and without reasonable cause whatsoever, caused and procured the arrest of the plaintiff, upon the charge of having feloniously stolen, taken and carried away certain household furniture, to wit; (Describe property) the property of and caused and procured police officer of the city of to take the said to the police station, where she was searched and locked up and was otherwise humiliated; that on the said day the defendant did cause her, the said plaintiff to be taken before the police station in the city of, and thereafter, after a hearing before the presiding magistrate at the police station she, the said plaintiff was committed for the action of the criminal court of and there charged the plaintiff with having committed the aforesaid crime; that said plaintiff was tried before his honor of the criminal court of; that said charge was in effect false, and the plaintiff, upon the trial thereof by the criminal court, was acquitted and discharged;

that the defendant made the said charge from the motives of malice, that there was no reasonable or probable cause for said prosecution; that the plaintiff was at and before the time of her said arrest, a married woman; that the plaintiff's character and reputation for integrity and honesty has always been above suspicion, and that the said prosecution has greatly impaired the reputation of the plaintiff; and that the plaintiff was made ill, and has suffered other injuries as a result of such prosecution as aforesaid. Wherefore, etc.

(Virginia)

For this, to wit, that the said plaintiff was known to all the citizens of the commonwealth of Virginia as a person of good name, fame and credit and honest, and that he was innocent of the crime imputed to him by the said defendant as hereinafter set forth, but the said defendant contriving and maliciously intending to injure the said plaintiff in his aforesaid good name, fame and credit, and to bring him into public scandal, infamy and disgrace and to cause the said plaintiff to be suspected of the crime hereinafter set forth, and to be imprisoned for a long space of time and thereby to impoverish, oppress and wholly ruin him, heretofore, to wit, on the day of
, in the city of caused and authorized through its duly authorized agent a criminal warrant to be sworn out before one then and there being one of the justices of the peace in said city, and then and there before said justice of the peace falsely and maliciously, without any reasonable or probable cause whatsoever, charged the plaintiff with having feloniously stolen (Describe property) of said defendant, of the value of dollars, and upon such charge falsely and maliciously and without any reasonable or probable cause whatsoever, caused and procured the said justice of the peace to make and grant his certain warrant, in due form of law, for the apprehending and the taking of the said plaintiff, and of bringing the said plaintiff before
, the justice of the peace over the police court of the city of, to be dealt with according to law for the supposed offense; and the said defendant under and by virtue of said warrant afterwards, to wit, on the day, month and year aforesaid, wrongfully, unjustly, falsely, wantonly and maliciously and without any reasonable or probable cause whatsoever, caused the said plaintiff to be arrested by his body and to be imprisoned and detained in prison for a long space of time, to wit, for the space of day, then next following, and until the said defendant afterwards, to wit, on the day of, at the said city, falsely and maliciously and without any reasonable or probable cause whatsoever, caused the said plaintiff to be carried into custody before the said being such justice as aforesaid, and to be

committed by the said justice to imprisonment for a further examination; the said justice, having heard and considered all that the said defendant and its duly authorized agents could say, allege or prove against the said plaintiff, committed the said plaintiff to the grand jury of the court of the city of, and the plaintiff was again imprisoned for a long space of time, to wit, for the space of days; thereafter the said defendant and its duly authorized agents appeared before the grand jury on the day of, where an indictment was brought against the said plaintiff, charging him with having feloniously stolen (Describe property) from the said defendant of the value of dollars, and the said defendant then and there, wrongfully, unjustly, wantonly and maliciously and without any reasonable or probable cause whatsoever, again caused the said plaintiff to be arrested by his body and to be imprisoned for a long space of time, to wit, for the space of days, until he could be bailed for his appearance in said court at the trial of said indictment. That the said plaintiff on a certain date, to wit, the day of, in the court in the city of, was arraigned and tried on the said indictment, which, without proper cause, was instigated by the defendant through its duly authorized agents, and the said plaintiff was adjudged and determined by the said court and its jury in said trial to be "not guilty" of the supposed offense, and the said plaintiff was then and there discharged out of the custody and fully acquitted of the said supposed offense; and the prosecution of the same has fully and finally ended. By means of said premises the said plaintiff has been greatly injured in his health and reputation and put to great inconvenience and expense, to wit, dollars, in defending himself in said prosecution, and has been disgraced and injured, to the damage, etc.

(West Virginia)

For this, to wit, that whereas the said plaintiff is a good, true, just and honest citizen of this state and as such hath always behaved and conducted himself, and until the committing of the grievances by the said defendant, as hereinafter mentioned, was always reputed, esteemed and accepted by and amongst all his neighbors, and other good and worthy citizens of this state, to whom he was known, to be a person of good name, fame and credit; and whereas, also, the said plaintiff hath never been guilty, nor until the time of the committing of the said grievances by the said defendant, as hereinafter mentioned, been suspected to have been guilty of stealing or larceny, or of any other crime as hereinafter stated to have been charged upon or imputed to him by the said defendant; by means whereof the said plaintiff before the committing of the

grievances by the said defendant, as hereinafter mentioned, had deservedly obtained the good opinion and credit of all his neighbors and other good and worthy citizens of this state, to whom he was known to be an honest and upright man, and would neither wrong, harm nor steal from his fellowman; and whereas the said defendant, contriving and maliciously intending to injure the said plaintiff in his aforesaid good name, fame and credit and to bring him into public scandal, infamy and disgrace, and to cause the said plaintiff to be imprisoned for a long space of time, and thereby to impoverish, suppress and wholly ruin him, heretofore, to wit, on the day of, in the year 19.., at the county of, appeared before one, then and there being one of the justices of the peace in and for the said county, and a relative of the said plaintiff, and then and there before the said justice of the peace falsely and maliciously, without any reasonable or probable cause whatsoever, charge the said plaintiff with having taken, stolen and carried away, a certain paper writing of the value of \$....., the property of the defendant, and upon such charge, falsely and maliciously, and without any reasonable or probable cause whatsoever, caused and procured the said, so being such justice as aforesaid, to make and grant his certain warrant, in due form of law, for the apprehending and taking of the said plaintiff, and for bringing the said plaintiff before the said, or some other justice of the peace in and for the said county of, to be dealt with according to law for the said supposed offense.

And the said defendant, under and by virtue of the said warrant, afterwards, to wit, on the day and year aforesaid, wrongfully and unjustly, and without any reasonable cause whatsoever, caused the said plaintiff to be arrested by his body and to be imprisoned and restrained of his liberty for a long space of time, to wit, for a space of days then next following, and until the said defendant, afterwards, to wit, on the day of, 19.., at the county of, falsely and maliciously, and without any reasonable or probable cause whatsoever, caused the said plaintiff to be carried in custody before the said, so being such justice as aforesaid, and to be committed and bailed by the said justice, for a further examination, and to be kept and held and deprived of his liberty on his recognizance given to said justice for a long space of time, to wit, for the space of days then next following, and until the said defendant afterwards, to wit, on the day of, 19.., falsely and maliciously and without any reasonable or probable cause whatsoever, caused the said plaintiff to be carried in custody before one, then and there being a certain other justice of the peace in and for the said county of, to be examined before the said justice touching the said supposed crime.

Which said last mentioned justice, having heard and considered all that the said defendant could say, allege or prove against the said defendant, touching and concerning the said supposed offense, then and there, to wit, on the day and year last aforesaid, at the county aforesaid, adjudged and determined that the said plaintiff was not guilty of the said supposed offense, and then and there caused the said plaintiff to be discharged out of custody, released from his said bond and recognizance, fully acquitted of said supposed offense; and the said defendant hath not further prosecuted his said complaint, but hath deserted and abandoned the same, and the said complaint and prosecution are now fully ended.

2 And for this also that the said defendant, further contriving and maliciously and wickedly intending as aforesaid the said plaintiff to defame, impoverish, oppress and ruin, heretofore, to wit, on the day of, in the year 19.., at the county of, falsely and maliciously and without any reasonable or probable cause whatsoever, charged the said plaintiff with having committed a certain offense, punishable by law, to wit, a misdemeanor; and upon the last mentioned charge the said defendant then and there, to wit, on the day of, 19.., at the county aforesaid, falsely and maliciously, caused and procured the said plaintiff to be arrested by his body and be imprisoned and deprived of his liberty for a long space of time, to wit, for the space of days then next following, and at the expiration of which said time the said plaintiff was fully acquitted and duly discharged of the said last mentioned offense.

By means of which several premises the said plaintiff hath been and is greatly injured in his said credit and reputation and brought into public scandal, infamy and disgrace, with and amongst all his neighbors, and other good and worthy citizens of this state; and divers of those neighbors and citizens, to whom his innocence in the premises was unknown have, by reason of the premises, suspected and believed, and still do suspect and believe that the said plaintiff hath been and is guilty of stealing and larceny; and also, by reason of the premises, the said plaintiff hath suffered great anxiety and pain of body and mind, and hath been obliged to lay out and expend, and hath necessarily laid out and expended divers sums of money, in the whole amounting to a large sum, to wit, the sum of dollars, in and about the procuring of his discharge from the said imprisonment, and the defending of himself in the premises, and the manifestation of his innocence in that behalf; and hath been greatly hindered, by reason of the premises from following and transacting his lawful and necessary affairs and business for a long space of time, to wit, for the space of days; and also by reason and means of the said premises, hath been and is greatly injured and damnified in his credit and circumstances. To the damage, etc.

1339 Injunction, action

No action is maintainable for maliciously suing out a writ of injunction where an injunction bond has been given; because the defendant in the injunction suit is fully indemnified by the injunction bond.⁷⁶

1340 Replevin, Narr. (Mich.)

For that whereas, before and at the time of the committing of the grievances next hereinafter mentioned, and for a long space of time then next preceding, said plaintiff has been wholly engaged in the study of music, thereby preparing and fitting herself for the business, occupation and profession of a teacher of music, expecting and intending thereby to follow said profession for a livelihood, to wit, at the of in said county, and in pursuing and carrying on such study and occupation successfully it became and was necessary for said plaintiff to have a pianoforte to use in and about the daily practice of said study; and to that end and purpose, the said plaintiff became and was possessed, in her own right, of one pianoforte of great value, to wit, dollars. And whereas before and up to, the time of the committing of the grievances hereinafter mentioned said plaintiff was using said pianoforte in her daily study and practice, and thereby deriving great profit and advantage from its use, and in consequence thereof was becoming more expert and proficient in her said study and in preparing herself, as aforesaid, for the profession of a teacher of music. Yet, the said defendant contriving and maliciously intending, wrongfully and unjustly to injure the said plaintiff, in said behalf heretofore, to wit, on the day of, at the of in said county, came to the house and home of said plaintiff, bringing with him divers other persons who were acting under his advice and command and for him, and then and there maliciously contriving and intending to injure the said plaintiff gave out and stated that he had a writ of replevin in favor of one and against, that by said writ he had authority to take said pianoforte hereinbefore mentioned, the property of said plaintiff and in her possession. That said defendant, then and there well knew that the said property was not the property of either of the parties to said writ of replevin, and that neither of them was entitled to the possession of the same, but that it was the property of the said plaintiff and in her possession, and that he had no legal right to seize said pianoforte on said writ. But that the said defendant maliciously

⁷⁶ Gorton v. Brown, 27 Ill. 489 (1862); Spaid v. Barrett, 57 Ill. 293.

contriving and intending to injure said plaintiff in this regard then and there, aided and assisted by said divers persons in his employ and under his command, took and carried away said pianoforte by force from the possession of said plaintiff by threats of arrest and imprisonment if she resisted or in any way hindered him from taking the same; and he, the said defendant, afterwards, to wit, on the same day, illegally and wrongfully converted the said pianoforte to his own use and wholly refused to return the same to the plaintiff, and the same has been entirely lost to her and she has been deprived wholly of its use and deprived of the opportunity of further pursuing her said studies and preparing herself for a teacher of music, to the damage, etc.

1341 Malpractice as physician, Narr. (Md.)

For that, heretofore, to wit, on or about, 19. . . , the defendant, being a practicing physician in city, and state of Maryland, with large and extended experience, and being the family physician of the said , the father of the infant plaintiff, and the said defendant holding himself out as a competent and skillful physician and one who would carefully attend patients who might employ him, the said defendant was sent for on or about said day of , 19. . . , to call at the home of the said , in city, to attend the wife of the said , who was about to give birth to a child, and the said defendant responded to said call and came to the home of the said and made an examination of his wife, and at or about o'clock, midnight, the said defendant undertook, as a physician the delivery of said child, and after about hours of labor with the use of forceps the infant daughter, , was brought into the world on the day of , 19. . . ; and the plaintiff further says that it was and became the duty of the defendant to make a careful examination of the mother of the infant plaintiff before her birth, and to make such examination as was in common use among skilled physicians, dealing with the birth of children, and to use and exercise reasonable care and skill in preparing the mother of said infant plaintiff for the delivery of said child and also to use and exercise reasonable care and skill in the delivery of said infant plaintiff at said birth, so that said infant plaintiff might be brought into the world free from the negligence and unskillfulness of said defendant; and the plaintiff further says that the said defendant was negligent and unskillful and failed to exercise and use reasonable care and skill in the delivery of said infant plaintiff in that, by the use of forceps he caused an indenture to be made in the forehead of said infant plaintiff, and immediately after the delivery of said infant plaintiff and on

several occasions thereafter said indenture was called to the attention of said defendant, and he was called and requested to treat the same, but the said defendant failed and neglected to diagnose said trouble, and failed and neglected to treat said indenture so caused by his negligent and unskillful treatment, and his failure to use and exercise reasonable care and skill in the delivery of said infant plaintiff, saying that it was nothing and would not in anyway affect the infant plaintiff, and that although the said defendant visited the home of the mother of the infant plaintiff for some time after her birth, and examined said infant plaintiff and treated said infant plaintiff, he failed and neglected to make any effort to treat, remove or eliminate said indenture upon the forehead of said infant plaintiff, although often requested to do so, and that by the unskillful and improper treatment of the infant plaintiff, during her birth, and thereafter, and the failure of the defendant to use and exercise reasonable care and skill at the birth of said infant plaintiff and in the treatment of said infant plaintiff after her birth, and the neglect, default and failure of the defendant to diagnose, treat, remove or eliminate the indenture upon the forehead of the infant plaintiff, caused by the defendant as aforesaid, and which he was often requested to do, and which was often called to his attention, the said infant became unable to walk or talk or use her mental faculties, so that she has become an imbecile, the proper development of her mental faculties having been arrested, although said infant plaintiff has since the day of, 19.., when said indenture in her forehead, caused as aforesaid, was operated upon and removed by Dr. of the hospital of city become somewhat improved, and said infant plaintiff shows material benefit since said operation, and which condition however of said infant plaintiff was caused and is now existing by virtue of the negligence and unskillfulness of the defendant and his failure to use and exercise reasonable care and skill in the delivery of the infant plaintiff at her birth, and the negligence and unskillfulness of the defendant and the failure of the defendant to use and exercise reasonable care and skill in diagnosing, treating and caring for said indenture upon the forehead of the infant plaintiff, caused by the defendant as aforesaid, at her birth, which condition of said infant plaintiff's head was called to the attention of said defendant and he was requested to treat the same, and that by reason of the failure, neglect and default of the said defendant to use and exercise reasonable care and skill in the delivery of said infant plaintiff at her birth and in diagnosing, treating and caring for the indenture in the forehead of the infant plaintiff although often requested so to do and caused as aforesaid by the negligence, default and unskillfulness of the defendant at the birth of said infant plaintiff, said infant plaintiff has become and is unable to walk, talk or use her mental faculties as otherwise she would have been

able to do had it not been for the negligence and unskillfulness of the defendant, and his failure to use and exercise reasonable care and skill at the birth of said infant plaintiff and in diagnosing, caring for and treating said indenture on the forehead of said infant plaintiff, which he was requested to do, wherefore said infant plaintiff has become and is seriously and permanently injured.

And the plaintiff brings this suit and claims dollars.

Next friend's authority

To the honorable the judge of said court:

I hereby authorize and direct the use of my name in this suit, as the next friend of

.....

1342 Nuisance, private; action, notice, damages

An action on the case is maintainable for a private nuisance consisting of smells, smoke, etc., caused by the manufacture of gases and rendering premises uncomfortable for habitation.⁷⁷ The party aggrieved has the right, at common law, to peaceably abate a private nuisance.⁷⁸ A party who sustains damages by temporary nuisance may have successive actions for their recovery until the nuisance is abated.⁷⁹ A grantee or lessee who comes into possession of lands with an existing nuisance upon them cannot be held liable for an action for damages until he has been first notified to remove the same; but this rule has no application to railroads which have been constructed after the Illinois Railroad act of 1891 went into effect.⁸⁰ The unsuccessful attempt to remove or remedy a nuisance does not entitle a party who is liable for the continuation of the nuisance to further notice to remove it before bringing an action therefor.⁸¹ In case of nuisance a party is entitled to past, present and future damages if the nuisance is permanent, and to damages accrued up to the time of the bringing of the suit, if the nuisance is temporary.⁸²

⁷⁷ Ottawa Gas-Light & Coke Co. v. Thompson, 39 Ill. 598, 606 (1864).

⁷⁸ Schmidt v. Brown, 226 Ill. 590, 604 (1907).

⁷⁹ Fairbank Co. v. Bahre, 213 Ill. 636, 642 (1905).

⁸⁰ Tetherington v. St. Louis, Troy

& Eastern R. Co., 226 Ill., 129, 132 (1907).

⁸¹ Chicago, Peoria & St. Louis Ry. Co. v. Reuter, 223 Ill. 387, 392 (1906).

⁸² Fairbank Co. v. Bahre, 213 Ill. 641.

1343 Nuisance, public; action

A private action is maintainable by anyone who suffers special damages different in kind and not merely in degree or extent, from the damages sustained by the public in general, and who is himself free from contributory negligence.⁸³

1344 Nuisance, declaration requisites

In an action on the case for damages resulting from a private nuisance it is not necessary to charge the defendant with negligence, because as a general rule, the question of want of care is not involved in such an action. Nor is it necessary to use the word "nuisance" if the facts alleged constitute a nuisance.⁸⁴ In an action for damages which result from a public nuisance the declaration must show special and peculiar damages, different in kind, and not merely in degree or extent, from those which the general public has sustained.⁸⁵

1345 Obstructing navigation, bridge; action

A township having the control of bridges is liable for the obstruction of navigation by the construction and maintenance of a bridge.⁸⁶

1346 Obstructing navigation, bridge; declaration requisites

In an action based upon the construction and maintenance of a bridge over a navigable river, it must be averred in the declaration that the construction and maintenance of the bridge interferes with the plaintiff's established business on the river above or below the place of the bridge, or that the construction and maintenance of the bridge injuriously affects the plaintiff's riparian property rights.⁸⁷

1347 Obstructing public street, railroad; action

The erection and the maintenance of an unlawful obstruction in a public street or highway, as the unlawful construction and

⁸³ *McEniry v. Tri-City Ry. Co.*, 254 Ill. 99, 102 (1912).

⁸⁴ *Laffin & Rand Powder Co. v. Tearney*, 131 Ill. 322, 325, 326 (1890).

⁸⁵ *Swain & Son v. Chicago, Burlington & Quincy R. Co.*, 252 Ill. 622, 626 (1912).

⁸⁶ *Harlem v. Emmert*, 41 Ill. 319, 323 (1866).

⁸⁷ *Swain & Son v. Chicago, Burlington & Quincy R. Co.*, 252 Ill. 625.

operation of a railway, is an actionable nuisance when special damages and freedom from contributory negligence are made the basis of the action.⁸⁸

1348 Obstructing public street, railroad; declaration requisites

A declaration based upon the unlawful obstruction of a street must allege the unlawful character of the obstruction, the plaintiff's freedom from contributory negligence, and special damages different in kind, and not merely in degree or extent, from the damages sustained by the public in general.⁸⁹ The declaration must show a state of facts from which the legal conclusion can be drawn that the obstruction had been maintained in the street for an unreasonable length of time.⁹⁰ In an action for damages resulting from the construction and operation of a railroad adjoining the plaintiff's premises, the declaration must aver facts showing that the damages to the plaintiff's property are of a permanent nature. The description of the *locus in quo* is legally essential to and is of the substance of this action. An averment of a specific description must be proved as laid.⁹¹

1349 Overflow of lands, dam across slough, Narr. (Ill.)

For that whereas, the plaintiff was, on the day of, 19.., and for a long time prior thereto had been, in possession of, using and occupying the following described real estate, to wit, a parcel of land consisting of acres off of the north end of a certain tract of land known as tract situated on a certain island known as or island, lying in section in township, range, west of the third principal meridian in the county of, in the state of Illinois, the said acre tract being bounded (State legal boundaries), which tract of land in question was, at that time, and prior thereto had been, used for agricultural purposes by the plaintiff; that along the east line of the above described tract was a natural water-course known as slough, through which the surface water and drains from the lands contiguous thereto, and from the lands eastward and northward of said slough, and from the creeks and branches to the northward and eastward thereof were discharged into the river; and through which

⁸⁸ McEniry v. Tri-City Ry. Co., 254 Ill. 102.

⁸⁹ McEniry v. Tri-City Ry. Co., *supra*.

⁹⁰ Lefkovitz v. Chicago, 238 Ill. 23, 30 (1909).

⁹¹ Hart v. Wabash Southern Ry. Co., 238 Ill. 336 (1909); Wisconsin Central R. Co. v. Wiczorek, 151 Ill. 579, 585 (1894).

water-course the back water and flood water of the river also found their way again into said river without damage to the land aforesaid.

And the plaintiff avers that the defendant, well knowing the premises aforesaid prior to the time above named, constructed a dam or dyke across the said slough about a half a mile south of the land occupied and tilled by the plaintiff as aforesaid, thereby causing on, to wit, the date aforesaid, the water which would naturally pass off and through the said slough into the river to be obstructed and thrown back upon the lands then occupied by the plaintiff as above described, whereby plaintiff's crops on said lands consisting of wheat, corn, oats and potatoes were destroyed, and the land was thereby by reason of said overflow greatly damaged for that season and for the succeeding season. To the damage, etc.

b

For that whereas, before and at the time of the committing of the grievances by the defendants hereinafter mentioned, a certain farm with the appurtenances, situated in the county and state aforesaid and described as follows, to wit, the (Insert description) P. M., were in the possession and occupation of one, the reversion thereof then and there belonging to the plaintiff as it still does, at, to wit, the county and state aforesaid; and the plaintiff avers that before and until the time of the committing of the grievances by the defendants hereinafter mentioned, through, over and across the northeast portion of which said premises from the south in a northerly direction, an ancient stream, slough, or water-course, was wont to turn and flow in its natural channel, without obstruction or interruption, and of right ought now to so run and flow; by means whereof said premises from the time whereof the memory of man runneth not to the contrary, and until the said time when, etc., were drained, maintained, and kept in good tillable and arable condition, and free from all injurious and damaging excess of water; and of right ought now to be so drained, maintained and kept in good tillable and arable condition, and free from all injurious and damaging excess of water, by means whereof, and upon said premises, before, at, and until the said time, when, etc., there were accustomed annually to grow and mature large quantities of the usual and ordinary farm products, of great yearly value, to wit, of the yearly value of dollars.

And the defendants, well knowing the premises, but contriving to injure the plaintiff in his reversionary estate, and interest in and to said premises, and the appurtenances thereunto belonging, whilst they were so in the possession and occupation of the said and whilst the plaintiff was so interested therein as aforesaid, on, to wit, the day of

....., 19.., and at, to wit, the county aforesaid, wrongfully and injuriously, with a certain line or track of railroad, commonly called the, with the trenches, bridges and embankments thereof by the defendants, then and there built and constructed over, through and across said premises and the said ancient stream, slough or water-course, obstructed, and impeded, and so narrowed and filled up, and caused to be so obstructed and impeded, and so narrowed and filled up, the natural channel thereof, that said ancient stream, slough, or water-course thereby became and was, on, to wit, the said of, 19.., and at, to wit, the county aforesaid, permanently incapable of draining, maintaining and keeping said premises in good tillable and arable condition, and free from all injurious and damaging excess of water, as before, at, and until the said time, when, etc., said premises were accustomed to, and of right ought now to be drained, maintained and kept in good tillable and arable condition, and free from all injurious and damaging excess of water.

Whereby, and by means whereof, said premises were, on, to wit,, 19.., and, at, to wit, the county and state aforesaid, and from thence hitherto have been, and from time to time in the future will be, rendered permanently unfit and incapable of growing and producing the said annual crops of the said ordinary and usual farm products; by means of which said several premises the plaintiff, has been, and is, badly prejudiced and injured in his said reversionary interest and estate in and to said premises and the appurtenances thereunto belonging. Wherefore, etc.

1350 Overflow of lands, ditch improperly constructed, Narr. (Ill.)

For that whereas, during the year and prior thereto and until the present time, plaintiffs, as tenants in common, have been possessed of a leasehold estate in and have been in possession and occupation of the following described property, to wit: a certain farm or tract of land known as the "..... farm," situated in the county of and state of Illinois, in sections and, township, range west, said farm containing about acres, and being bounded on the north by the road, south by the railroad tracks, east by the farm known as the "..... farm," and west by land known as the farm, which said farm or tract of land has been cultivated and used by plaintiffs for agricultural and grazing purposes; and, whereas, the natural fall and drain of a large portion of said farm being the eastern portion thereof is now and always has been to the south and then to the east, the waters draining on to it and falling thereon naturally flowing and draining first southwardly into a ditch or drain, which runs along the southern

line of said farm, and then eastwardly in said ditch, through the adjoining tract of land known as the farm into a natural depression or water-course which runs through said farm from north to south at a distance of about yards east of the said farm leased by plaintiffs, and which passes under and through a trestle of the railroad at a point a little south of plaintiff's said farm and about yards east thereof; the said natural depression or water-course, prior to the commission by defendant of the wrongs and injuries hereinafter mentioned, having at all times been adequate and sufficient to carry off waters flowing and draining therein, and having served as and constituted an adequate and sufficient drain for the said eastern portion of said farm so leased by plaintiffs; and whereas, at all times hereinafter mentioned defendant was and still is a corporation engaged in the business of operating a certain system of railroad, and possessing, maintaining, operating and controlling a certain right of way, roadbed and railroad track, running east to west at a distance of about yards more or less south of the above mentioned farm leased by plaintiffs, as aforesaid, and nearly parallel to the south line thereof; and, whereas there is a certain running stream, creek, or natural water-course known as, having a well defined bed and channel, which said creek enters from the east of the above mentioned farm, which is, as aforesaid, a tract of land adjoining the said farm, leased by plaintiffs, on the east, and then flows in a general westwardly direction along the north side of defendant's right of way and railroad track until it arrives at a trestle constructed on defendant's said right of way about yards, more or less, southeast of the said farm, and, while in its natural course and condition, and prior to the commission by defendant of the grievances herein complained of, said creek, upon arriving at said trestle, made a turn or bend southwardly and flowed through said trestle and underneath defendant's roadbed and railroad track continuing its course south thereof, and being at all times of sufficient dimensions to carry off all waters and drift, naturally flowing and draining therein, and discharging same south of said trestle; and, whereas, heretofore, to wit, during the year, defendant did wrongfully obstruct, change and divert the natural course of said where it flowed under defendant's said track and through said trestle as aforesaid, and did dig a ditch which it connected with said creek immediately north of said trestle and on its said right of way, said ditch extending in a westerly direction from its junction with said creek, along the north side of defendant's said right of way and parallel thereto for a distance of about one-half a mile, more or less, and then emptying into the first above mentioned depression or water-course which served as a drain for the eastern portion of said farm, which was occupied and cultivated by plaintiffs aforesaid; by means of

which wrongful acts of defendant the water and drift which naturally was accustomed to flow in said creek and be discharged south of defendant's said railroad, was diverted in said ditch and flowed westwardly for a long distance therein, whereby the course and channel of said creek was changed and diverted and the flow of the water therein was hindered, and obstructed.

And thereupon it became the duty of defendant to construct and at all times maintain said ditch in a careful and skillful manner so that it would at all times be in all respects fully adequate and sufficient to carry off all water and drift flowing therein from said creek; but plaintiffs aver that defendant, disregarding its duty in that behalf, constructed said ditch in a negligent, unskillful and insufficient manner, and that said ditch has ever since its construction been negligently, unskillfully and insufficiently maintained by defendant, and has at all times been of much less width and depth than the natural bed of the aforesaid creek, and has been of insufficient size and dimensions and totally inadequate to properly carry away the water flowing therein in time of severe rain; all of which said wrongful acts were done by defendant in the county of, state of Illinois; that because of the insufficient manner in which said ditch has been constructed and maintained, logs, branches, leaves, and drift of all kinds, which found their way into said creek, and thence into said ditch, all of which said creek had heretofore, while in its natural state, readily carried along and discharged south of defendant's railroad, as well as such rocks and drift as fell or otherwise found their way directly into said ditch, became attached and stuck to the sides and bottom of said ditch, thus clogging and damming it up and impeding and obstructing its flow; and plaintiffs aver that during the spring and summer of, by reason of the wrongful diversion of the natural course of said creek by defendant and of the unskillful, insufficient, inadequate and negligent manner in which said ditch was constructed and maintained by defendant as aforesaid, and the insufficient dimensions thereof, said ditch became clogged and dammed up with rocks, branches, logs, drift, etc., and in time of severe rain was totally insufficient and unable to carry off the water flowing therein, and such water was backed up into creek, and said creek and said ditch both overflowed their banks and a large volume of water spread out over the adjoining land and flowed and was emptied into the first above mentioned depression or water-course, which served as a drain for said eastern portion of said farm, leased by plaintiffs, as aforesaid, and a large quantity of said water was forced and flowed with a strong current in a northwardly direction toward, under and through the first above mentioned trestle, through which said depression or water-course, draining the said farm leased by the plaintiffs

passed in its course; that said large volume of water thus emptying into said depression or water-course and thus forced northwardly under said trestle carried with it a large quantity of drift, debris and sediment which was deposited in said depression south of said trestle and also under said trestle, whereby said trestle became partially clogged and dammed and the said depression was partially filled up, obstructing and impeding the natural flow of said depression or water-course; and in the spring and summer of the water thus carried northwardly through said trestle as well as the water flowing and draining into said water-course north of said trestle was unable to adequately flow or drain back southwardly in the natural channel of said water-course as it had been accustomed to drain, and the water naturally draining off of the said eastern portion of said farm into the above mentioned ditch running along the south line thereof, as aforesaid, and then through said ditch into said water-course could no longer so flow and drain, but such water together with the water thus forced northwardly through said trestle, was backed up into said ditch and on to said farm and overflowed the same, and said eastern portion of said farm was prevented from being adequately drained as it previously had been by means of the aforesaid depression or water-course.

Whereby said farm, so leased by plaintiffs, was flooded and the crops of wheat, clover, and other agricultural products which plaintiffs had planted and were cultivating were ruined, and a large tract of pasture land covered with grass and used for grazing purposes was rendered unfit for such use during the season of, or for any valuable use; and plaintiffs, were damaged in many and divers other ways in the sum of dollars; wherefore, etc.

1351 Overflow of lands, drainage channel, action

The Sanitary District of Chicago is liable for damages to lands caused by overflows of its channels, regardless of the absence of proof of negligence in their operation; and the plaintiff is entitled to a reasonable attorney's fee in an action for such damages.⁹²

1352 Overflow of lands, drainage channel, Narr. (Ill.)

For that whereas, on, to wit, the day of, 19.., and for more than years prior thereto and from thence hitherto the said plaintiff owned in fee simple the following described real estate, all lying within county in the state of Illinois, said property lying adjacent to

⁹² Jones v. Sanitary District, 252 Ill. 591, 604, 606 (1912).

and near to the river, said property being as follows, to wit: (Insert description) which said real estate was covered with timber of great value in a lively and flourishing condition on the said day of, 19.., and which said timber consisted of oak, ash, linden, butternut, walnut, pecan and various other trees, the lumber of which was valuable for commercial and manufacturing purposes.

And plaintiff further alleges that said lands during all of said period above mentioned were valuable to plaintiff for grazing purposes and for agricultural purposes and were used from time to time by the plaintiff for both of said purposes and also for the cutting of timber therefrom to be sold as a source of profit by the said plaintiff.

Plaintiff further alleges that on the said day of, 19.., and at all times since said date, the said defendant has been engaged in causing the waters of Lake Michigan to flow through its certain drainage canal, and by means of other intermediate canals and streams into the river so that said water flowed into said river at a point above the district wherein are located the lands of the plaintiff, and that thereby the amount of water in the river has been greatly increased during all of the period aforesaid, namely from, 19.., until the beginning of this suit, and until the present time.

And plaintiff alleges that said sanitary canal was constructed and operated by said defendant under and pursuant to a certain statute of the state of Illinois in that behalf, giving the said defendant power to operate said sanitary canal but providing that said sanitary district, the defendant herein, should be liable for all damage to any real estate within or without said district which should be overflowed or otherwise damaged by reason of the construction, enlargement or use of said channel.

That during the period aforesaid the said defendant has continuously operated said sanitary canal and has during said period continuously and at all times cast large quantities of water into said river, so that the same has continuously overflowed its banks at or near the aforesaid lands of the said plaintiff and said waters of said river, by reason thereof, have overflowed onto and across and upon the lands aforesaid of the said plaintiff, and has stood upon said lands for the greater portion of each year.

And the plaintiff alleges that said quantities of water flowing over and standing upon the said lands aforesaid causes and has caused large numbers of said trees to die, and that by reason of the overflowing of the said lands as aforesaid so caused by the said defendant by the use of said sanitary canal and by reason of the waters standing upon the lands aforesaid, the said timber upon said lands has been continuously and continually dying during the period aforesaid and is now gradually dying and many trees are dead upon said land, by reason of said

grievances, and many of said trees are dying and are in a dying condition, so that the plaintiff by reason of the acts of the said defendant has been greatly damnified and the standing timber and trees upon said lands has been greatly damaged.

And the plaintiff further alleges that by reason of the overflow of said waters upon said lands aforesaid so caused to overflow by the acts of the said defendant, plaintiff has lost large gains and profits which he might otherwise have acquired from said land for grazing and agricultural purposes during the period aforesaid.

Wherefore an action has accrued to this plaintiff under and by virtue of the statute in that case made and provided to demand and recover of the defendant the damages so sustained by him. To the damage, etc.

1353 Overflow of lands, embankment; action

A railroad company is liable at common law, in damages, for the overflow of abutting lands caused by the negligent construction or maintenance of embankments whereby the natural channel through the surface waters derived from rain or snow is obstructed.⁹³ Each overflow upon land of adjoining owners caused by the negligence of another is a fresh nuisance and creates a new cause of action.⁹⁴ A nuisance thus created is permanent, and authorizes a recovery for past and future injury to the property.⁹⁵

1354 Overflow of lands, embankment, Narr. (Ill.)

For that whereas the plaintiff, on, to wit, the day of, 19.., was and from thence hitherto has been and still is the owner and lawfully possessed of the following described real estate, to wit: (Set forth legal description), in county, Illinois, used and cultivated as a farm; and the defendant was and has been at all times since possessed of a certain right of way running along and near the northerly part of said real estate of the plaintiff.

That through or along the north part of plaintiff's said farm there then was and now is a certain stream commonly called, which runs and naturally drains large quantities of water off the said farm and many farms east and north and west of plaintiff's said farm in times of ordinary floods, heavy rain storms and freshets, said, also known as

⁹³ Chicago, Peoria & St. L. Ry. Co. v. Reuter, 223 Ill. 387 (1906).

⁹⁴ Chicago, Peoria & St. L. Ry. Co. v. Reuter, 223 Ill. 392; Ramey v. Baltimore & Ohio Southwestern R. Co., 235 Ill. 502, 506 (1908);

Strange v. Cleveland, C. C. & St. L. Ry. Co., 245 Ill. 246, 250 (1910); Cl. 5, sec. 19, c. 114, Hurd's Stat. 1909.

⁹⁵ Strange v. Cleveland, C. C. & St. L. Ry. Co., *supra*.

..... has always heretofore and now overflows its banks and spreads over part of the farm of the said plaintiff and other lands in the vicinity, and large quantities of the overflow water, as aforesaid, formerly naturally ran and flowed in a westerly and northwesterly direction through the lands of the plaintiff and adjoining lands into, over and upon the land known as the north of and adjacent to the lands of the plaintiff, and thence into the (creek), without serious injury to the farm of the plaintiff.

That, on, to wit,, 19.., the defendant was possessed of, using and operating a certain railroad over a certain embankment located on said right of way, which embankment was of great dimensions, to wit, of the height of feet, of the width of, to wit, feet and of the length of more than mile, which said embankment was built across the natural water-course or flow of said waters, which overflowed from said as aforesaid, and said embankment was without any openings therein to permit the free passage of water naturally flowing up to and against the same.

That, on, to wit,, 19.., a flood or freshet occurred and the overflow waters from said flowed toward the west and northwest up to, against and over said embankment, and broke the same and washed out a large part of said embankment, to wit, feet in length, feet in width and feet in depth and other places feet in length, across and under said railroad, and the waters which had accumulated and been held back by said embankment in their natural flow thereupon flowed through said opening in their former natural course to and upon the said farm and into said (creek).

That the defendant thereafter wrongfully and negligently repaired and rebuilt its said roadbed, embankment or fill as aforesaid which had so washed away as aforesaid, without any openings therein to permit the free passage of the water which might thereafter naturally flow to, upon and against said embankment, and thereafter maintained the same without any openings thereunder. And on divers and sundry days thereafter said embankment under said railroad was again washed out and away and again rebuilt solid as aforesaid by said defendant.

That on various days thereafter in the months of and and on other days since said time, by reason of said embankment, which the defendant so wrongfully and negligently rebuilt and maintained, the natural flow of large quantities of rain-water and the overflow waters from said which naturally flowed upon, over and across the said premises of the defendant were obstructed, and the said water was diverted from its natural course by said embankment, and ran and flowed in a different direction over and upon the said land and premises of the plaintiff, and large quantities of

said water were held and thrown and remained on the said lands of the plaintiff, and thereby the said lands and premises of the plaintiff were greatly damaged and injured and became and are swampy and to a great extent unfit for cultivation, and the crops growing thereon in the year and to the date of the commencement of this suit were, to a large extent, damaged and injured, to the damage, etc.

(Maryland)

For that whereas, the said plaintiff is and for long time prior hereto, to wit, years, has been the owner and in possession of a certain tract of land in the county of,, known as part of a tract called ".....", situated at or near,, along the railroad of the said defendant company; that the said defendant from, 19.., has been and still is the owner of a line of railway on which cars are operated by steam, a section of which railroad, known as the company, runs along a roadbed immediately adjacent to and abutting the said land of the plaintiff, on the east thereof; that on and before the said year, the said defendant, in the operation and maintenance of said branch of its railroad, had built and maintained, and now maintains a large embankment along the course of said railroad abutting the said land of the plaintiff on the east thereof, whereon it had constructed and maintains a roadbed, upon which tracks were laid and are maintained upon which its cars might and do run; that at the time of the building of said tracks and bank, that portion of the land of plaintiff lying contiguous to said bank and tracks, was low, inclined toward the east, and had a natural drainage across said land occupied by said railroad company as aforesaid, and the drainage of the said land of plaintiff was drained and carried off toward the east across said line or bank and railroad track; that said drainage of water and the flow thereof was not obstructed, but was free and carried away and off by natural drainage on the surface without damage to the said property of plaintiff, and said water and drainage had access towards the east, and at numerous places along the line of railroad track and bank, and was diffused and scattered in its flow along and over the surface across said line of railroad; that the building of said tracks and bank cut off and obstructed the flow of water and drainage towards the east across the same, and the defendant railroad company carelessly failed and omitted to make and maintain culverts and openings through said bank sufficient to allow the free passage of water underneath said track; but the plaintiff says that the defendant company built and constructed but one culvert underneath said track and bank, but that said culvert was carelessly, negligently and wrongfully permitted to become filled with mud and debris, and to rot, so that the water

which flows from her property cannot pass through it where it naturally should escape, and the defendant has carelessly, negligently and wrongfully permitted it to remain in that condition, and that from the said day of, 19.., hereinbefore mentioned, hitherto, the building of said embankment and maintenance of an insufficient culvert, has prevented the said drainage and water from freely flowing and draining off the said land of plaintiff as it had done before the happening of the grievances hereinbefore mentioned, but the same was and still is caused to be backed up and cast back by said obstruction and stand upon the lands of the said plaintiff for long periods; whereby and by reason whereof the use of the said land of plaintiff for agricultural and gardening purposes during all of which time has been prevented and destroyed, which use had theretofore existed and the benefits thereof accrued to the said plaintiff, and plaintiff has thereby been caused to suffer a loss of dollars; and further, the said land of plaintiff, although of great value before the happening of the grievances hereinbefore referred to, has by reason of the premises been greatly depreciated in value; all to the damage, etc.⁹⁶

(West Virginia)

For this, to wit, that heretofore, to wit, on the day of, 19.., the plaintiff was, and ever since has been, and now is, seized and possessed of a certain tract of land, lying and being situate on river, in county, West Virginia, and being a portion of a acre survey, patented by the commonwealth of Virginia to, by virtue of an entry made on the of,, the said portion containing acres, more or less, and bounded and described as follows: Beginning at (Give legal description).

Plaintiff says that the said river is a running stream of water with well defined channel, bed and banks; that the said tract of land above mentioned and described abuts upon and adjoins the said stream on the southern side thereof; that on the day and year last aforesaid and for a long time prior thereto the channel of said stream at and near the said tract of land, and especially where the said stream runs along by and adjoining the said tract of land, was such that the current of said stream was thrown to and ran near the northern bank of same and opposite the said tract of land owned by the plaintiff,

⁹⁶ The foregoing declaration may be used in states which follow the civil law concerning dominant and servient estates. The declaration should not be used in states

which follow the common law rule which does not recognize certain duties resting upon the servient estate. *Baltimore & Ohio R. Co. v. Thomas*, 37 App. D. C. 255 (1911).

which course the plaintiffs avers was the usual, ordinary and natural course of said stream and the current thereof.

And plaintiff says that he was of right entitled to have the said stream and the current thereof continue to run in its usual, ordinary and natural course or channel, and that it was the duty of the defendant to permit the said stream to flow in its usual, ordinary and natural course or channel, and not to divert the said stream and cause the same to flow in another than its usual, ordinary and natural course or channel, and not to change the course of the said stream so as to cause the same to flow out of its ordinary and usual course or channel and upon the lands of the plaintiff and cause damage thereto.

But plaintiff avers that on or about the day and year last aforesaid the said defendant not regarding its duty and obligation in this behalf, but wholly disregarding the same, and contriving and intending to injure and damage this plaintiff, wrongfully obstructed the bed or channel of said stream and changed the course of the current thereof by depositing within the said channel a large amount of earth and stone, and constructing a large fill or embankment therein, by reason whereof the said stream was diverted from its usual, ordinary and natural course or channel, and the current thereof caused to flow in another than its usual, ordinary and natural channel, and the course thereof so changed as to cut into the earth a deep ditch or channel of great width on the southern side of said stream and into the said land of the plaintiff, and outside of the usual, ordinary and natural course of said stream, thereby causing the said stream to flow along and through the said channel so cut by the said current as aforesaid, and out of its usual, ordinary and natural course, and through the said lands of the plaintiff; by reason whereof the said current of the said stream, being so diverted from its usual, ordinary and natural course as aforesaid, cut through, damaged, destroyed and washed away large portions of said land belonging to this plaintiff and so situated on and near the said stream as aforesaid, to the damage of the said plaintiff dollars.

Therefore he brings this suit.

1355 Overflow of lands, levee construction; action

If a drainage district has failed to compensate for land damaged by the construction of a levee an action on the case lies to determine the question whether such lands were damaged and to recover the damages; and if damages are recoverable they may be collected by assessment against the lands embraced in the drainage district.⁹⁷

⁹⁷ *Bradbury v. Vandalia Levee & Drainage District*, 236 Ill. 36, 44, 47 (1908).

1356 Overflow of lands, levee construction, Narr. (Illinois)

For that whereas, heretofore, to wit, on the day of, 19.., and for many years prior thereto, and from thence hitherto, plaintiffs were and are the owners of and in possession of the following described real estate, to wit: (Describe property) in county, Illinois, containing about acres, said land being known as high bottom land, and lies west of river.

And plaintiffs aver that said lands, in their natural states and before the committing of the grievances hereinafter complained of, were not subject to overflow by freshets or the flood waters of the river, but were valuable farming lands and cultivated by plaintiffs.

That the defendant the is a drainage district organized under an act of the Illinois legislature, entitled, An act for the construction, reparation and protection of drains, levees and ditches across the lands of others for agricultural, sanitary and mining purposes, and to provide for the organization of drainage districts, approved and in force May 29, 1879, together with the amendments thereto.

That said district was duly organized as above set forth, on or about the day of, 19.., and that the scope of the improvement provided for by said drainage district as fixed by the decree of the county court of county, Illinois, included the construction of a levee along the east side of the river as near the banks of said river as it could conveniently and safely be erected, said levee to begin at the mouth of creek about a quarter of a mile down the river towards its mouth from the lands above described, and continuing from thence along the east side of said river for a distance of about miles; also a levee to be constructed from the mouth of creek aforesaid in an easterly direction to the

That during the summer of said defendant by its commissioners, officers and servants erected and caused to be erected a levee as above described in accordance with the order and decree to said county court. Said levee so constructed was about feet in height, and feet wide on top, and is a solid embankment of earth with no outlet from the river into the lands lying on the east side of said river.

That the river is a stream of water running in a southwesterly direction through the county of, along and by the lands of plaintiff above described; that at the time of floods and freshets said stream of water overflows its banks, and overflows and inundates a wide strip of land, to wit, a strip about two miles in width, and that at flood time the bed of said river is about miles in width; but plaintiffs aver that by reason of the construction of said levee by the said de-

fendant as aforesaid, the said flood channel of the river is very much narrower; that in some places along said river below the lands of plaintiffs said flood channel does not exceed in width the width of, to wit, feet; that by reason of the construction of said levee the waters of said river were caused to rise much higher on the west side of said river and above said levee in time of freshets, and to thereby overflow the lands of plaintiffs. And plaintiffs allege that by reason of the construction of said levee by the defendant as aforesaid their said lands above described were damaged and various crops of corn and other grain growing thereon were destroyed and that the soil of said land washed away and said lands were rendered unwholesome, unhealthy to live upon, and that said lands were greatly depreciated in value.

Wherefore, and by reason of the premises and the laws of the state of Illinois in such case made and provided, and by reason of section 2 of an act for the construction, reparation and protection of drains, ditches and levees across the lands of others for agricultural, sanitary and mining purposes, and providing for the organization of drainage districts, approved and in force May 29, 1879, the defendant became and was liable to pay to the plaintiffs all of their said damages as aforesaid, to wit, in the sum of dollars.

2. And whereas also on or about the day of, 19.., plaintiffs were and still are the owners of and in possession of the following lands, to wit: All that part of the (Describe the same), which lies west of the river, in county, Illinois; and that said lands are high river bottom, and in a state of nature are not subject to overflow by the flood waters of the river except in times of very high freshets and floods, and that said lands are valuable farming lands and in a high state of cultivation.

And plaintiffs aver that the defendant is a drainage district organized under and in accordance with the statute of the state of Illinois; that, on, to wit, years ago said defendant by its agents and servants wrongfully constructed and caused to be constructed a levee along the east side of said river, beginning at a point about of a mile below the lands of plaintiffs, and running thence in a southwesterly direction along the east bank of the said river for a distance of about miles, and connected at the north end of said levee with the bluffs along the east side of the said river bottom; that said levee is a solid embankment of earth of an average height of about feet, and with an average width on top of about feet, without any opening from said river into the lands on the east of said river; and that said defendant by its agents and servants as aforesaid has wrongfully caused said levee to be maintained from thence hitherto.

Plaintiffs aver that the river in a state of nature

is a stream running in a general southwesterly direction through the county of, and along and by the lands of plaintiffs; that in a natural state, in times of freshets and floods the waters were accustomed to overflow the banks of said stream on both sides of said stream and that the flood channel of the said river is, to wit, about miles in width.

Plaintiffs aver that by reason of the wrongful construction of the said levee as aforesaid by the defendant as aforesaid, and the wrongful maintenance of the said levee, the waters of the said river are compelled to flow over and upon the lands on the west side of the river in a greater quantity, and to a greater depth than they otherwise would have flowed, causing the lands on the west side of said river and above said levee to be overflowed at times when they would not otherwise have overflowed; whereby crops of corn and other grain growing upon the lands of plaintiffs have been destroyed and damaged, and the lands of said plaintiffs have been washed and damaged and greatly diminished in value. Wherefore, etc.

1357 Overflow of lands, notice, requisites

No particular and defined location of the land is required by statute in a notice to be given to the sanitary district claiming damages from an overflow, but the notice is sufficient if it enables the sanitary officers to locate and examine the premises with a view to a settlement.⁹⁸

1358 Overflow of lands, sewer insufficient, Narr. (Illinois)

. For that whereas, before and at the time of the committing of the grievances by the defendant as hereinafter mentioned, the plaintiff was, and from thence hitherto had been and still is lawfully possessed of a certain tract of land and premises, with the appurtenances situated in the county of aforesaid, which land and premises with the appurtenances, the said plaintiff before and at the time, as aforesaid, used and enjoyed, and of right ought to use and enjoy for pasturage, grass and hay and for cultivating the same and sowing, planting, growing and raising thereon, and gathering and harvesting therefrom, grass, hay, oats, potatoes, corn, and other crops pertaining to good husbandry and agriculture, and to the great profit of said plaintiff, said land being, to wit: (Describe property) in county,; that the southeast side or portion of said land was next to and upon a certain river or body of water called the D river there being and flowing; that through said land there, then and there flowed a certain

⁹⁸ Miller v. Sanitary District, 242 Ill. 321, 327 (1909.)

stream of water known as R the waters of which then and there and along the lands of the plaintiff empties into said river; that said river and stream of water known as R for many years, to wit, years next prior to the committing of the grievances hereinafter mentioned, flowed in their natural courses and channels next to and adjoining and through said land and premises to said plaintiff's great profit, the same being rich and valuable land and premises, without hurt, injury or damage from waters of or flowing in said river, or said stream of water known as; and that said river, stream or waters, before and up to the time of the committing of the grievances hereinafter mentioned did not flood, run on or over, percolate through, saturate or stand in or upon said land or premises, or any part thereof, so as to damage the same or the pasturage, grass or crops thereon, or interfere with the use and enjoyment of said land and premises.

And the plaintiff avers that the defendant, on, to wit, the day of, 19.., was and is a corporation organized under the statutes of the state of Illinois and thereby was and is empowered, subject to the payment of all damages, to construct, improve, possess and use channels for the carrying and flowing of water and sewage and to regulate the passage and flow of water and sewage therein, and was and is under said statutes, and the law, liable for all damages to real estate which shall be overflowed or otherwise damaged by reason of the construction, enlargement or use of any channel, ditch, drain, outlet or other improvement made by it under said statutes, and for reasonable attorneys' fees for prosecution of suits therefor.

And the plaintiff avers that the defendant on the day and year aforesaid was and is using and is in control of certain permanent channels carrying, and for the future to continue to carry, large quantities of water and sewage from, to wit, the in the state of Illinois and from its vicinity, and from, to wit, the C river in said state and from Lake Michigan, upon whose shore said city is located down into said D river above the said premises of the plaintiff; and the defendant so using said channel and being in possession and control thereof did wrongfully and negligently cause and suffer large quantities of water and sewage to pass and flow through said channels, from the sources aforesaid, into said D river, at, to wit, or near the of in said county, above the said premises of the plaintiff, on, to wit, the day of, 19.., and divers other days and times between that time and the commencement of this suit, and still wrongfully and negligently causes and suffers such large quantities of waters and sewage so aforesaid, and not theretofore accustomed to flow in said D river, to pass and flow through said channels from the aforesaid sources into said D river at, to wit, the place aforesaid, thereby greatly increasing the volume of

water theretofore in said river and permanently and continuously overflowing the banks of said D river near, at, and adjoining plaintiff's said premises and causing the waters of said R to be dammed and backed up and to overflow its banks onto the plaintiff's said lands and thereby, and by reason of the premises, permanently overflowing and flooding, to wit, acres of said premises and causing water and sewage to run upon, over and through the same and to wash away large portions of the surface of, and to stand upon and in the same, wholly destroying the said acres of land, for the uses aforesaid and for all beneficial purposes and uses, so that the plaintiff has wholly lost the use and benefit of the same by reason of said acts and conduct of the defendant to the great injury, prejudice and hurt of the plaintiff in the possession, use, occupation and enjoyment of said land, rendering the same incommodious and unfit for all or any of the beneficial uses and of no value or use to the plaintiff by reason of the premises.

And the plaintiff avers that said overflowing and flooding of his said premises by the defendant, as aforesaid, was, is, and will be permanent and said channels and their appliances and the flowage of water and sewage as aforesaid in large quantities will be continuously maintained, so as to result in defendant's continuously and permanently flooding and damaging the plaintiff's premises; and on the day of, 19.., the plaintiff served upon the defendant by delivering to one of the trustees of the defendant a notice in writing that he, the plaintiff, had sustained damages by reason of overflow of the premises aforesaid in the sum of dollars and that he intended to sue for said damages; and plaintiff avers that his reasonable attorneys' fees in said cause are the sum of dollars.

Wherefore the plaintiff has sustained permanent injury and said premises have been and are permanently damaged, and the defendant has become and is liable under said statutes and under the law to the plaintiff in the sum of dollars; and therefore, he brings this suit.

(Maryland)

For that the defendant is a municipal corporation and as such is charged by law, among other duties, with the duty of skillfully and with ordinary care constructing, building and maintaining all of the sewers in said city of, and of properly grading, constructing, maintaining and keeping in order the streets belonging to said corporation. That at the happening of the damage hereinafter complained of, the plaintiff was the owner and in possession of a certain butcher business in city located at the premises No. and, which property has a front on of about one feet and abuts on the rear on a nat-

ural stream of water known as run, which run was for many years an open and unobstructed waterway. That some time before the happening of the injuries hereinafter complained of, the said defendant, the mayor and city council of, constructed a sewer to carry off all the water which theretofore had flowed in run, as well as the water which might fall and run therein. That the sewer so built in the bed of run by the defendant was so constructed as to connect with an existing sewer of the defendant. That in building the said sewer in run, from the carelessness of the defendant and the want of ordinary care, it did not provide said sewer and its connecting sewer with sufficient capacity and size to carry off the waters of run as well as the rain water which might be expected to flow therein and the waters which flow in the connecting sewer with which the run sewer was attached. That by the exercise of ordinary and reasonable care and diligence the defendant had notice, or might have had notice, of the injuries which would necessarily be inflicted upon the plaintiff by reason of the insufficient capacity and size of the said sewer with which run sewer connects. That by reason of the said insufficient size of said sewer with which run sewer connects, it fails to take off the water which drains therein when the said sewer is burdened by rain water which flows therein in addition to the ordinary flow of water in said sewer, and by reason of the insufficient capacity of said sewer, it has frequently overflowed into the slaughter house of the plaintiff and has, from time to time, within the last three years, frequently overflowed and backed up in the premises of the plaintiff, causing him serious loss and damage, both in his buildings, to his business, the stock of meats carried by him in cold storage, and the machinery and equipment used by him in connection with his said business, by reason whereof the plaintiff has suffered serious loss and damage;

2. And for that, also called street, is a public highway owned by the said corporation defendant, the mayor and city council of, and by reason of the failure of the said defendant to use proper care and diligence in caring for said street, it has failed to grade and pave the same and to place gutters in said street to carry off the waters which flow therein from rain and other sources, and the defendant, well knowing this and well knowing that recently other streets have been opened up connecting with in such manner that large quantities of water flow from other streets in and over, and said not being provided with gutters and other means for taking off said water, large quantities of water flow from other streets and from over and across the premises of the plaintiff so that his dwellings and buildings thereon and the machinery and equipment, and the stock of meats car-

ried by the plaintiff on said premises, have, within the last years, been seriously damaged, and the plaintiff has suffered great loss and damage.

Wherefore, he claims \$. damages.

1359 Public improvement, action

An injury which is the natural, probable and necessary result of a work done within the scope of legislative authority is not actionable.⁹⁹ If private property is damaged by the construction of a public improvement and no provision for compensation is made by the municipality, the owner of the property has a right of action on the case against such municipality for the omission of its duty to ascertain the damages, if any, and to provide means for its payment.¹⁰⁰ An action for damages occasioned by a public improvement is maintainable only when there is a direct physical disturbance of private property, such as practically or actually affects its enjoyment and use, causing the owner to sustain special damages with respect thereto as distinguished from a mere personal inconvenience or injury in excess of, or different in kind from, that sustained by the people of the whole neighborhood generally, susceptible of proof and capable of being approximately measured.¹⁰¹ Mere inconvenience, expense or loss of business occasioned to abutting owners by the temporary obstruction of a public street and the consequent interference with their right of access to other property made necessary by the construction of a public improvement, gives no cause of action against a municipality.¹⁰² A *quasi* public corporation is liable for special permanent damages done to private property by the erection of a bridge over a navigable river; but not for such damages as are incident to and shared by, the general public.¹⁰³

⁹⁹ Jones v. Sanitary District, 252 Ill. 600.

¹⁰⁰ Elgin v. Eaton, 83 Ill. 535, 537 (1876); Sec. 13, art. 2, Const. 1870; Beidler v. Sanitary District, 211 Ill. 628, 638 (1904).

¹⁰¹ Illinois Central R. Co. v. School Trustees, 212 Ill. 406 (1904);

Rigney v. Chicago, 102 Ill. 64, 78 (1882); Chicago & W. I. R. Co. v. Ayres, 106, Ill. 511, 518 (1883); Sec. 13, art. 2, Const. 1870.

¹⁰² Chicago Flour Co. v. Chicago, 243 Ill. 268, 271 (1910).

¹⁰³ Chicago & Pacific R. Co. v. Stein, 75 Ill. 41, 45 (1874).

1360 Replevin bond, insufficient, action

A sheriff who fails in his duty to exercise the best means of securing a sufficient bond for the return of replevined property, is liable to an action on the case to the party injured.¹⁰⁴

1361 Reversion, action

The owner of premises occupied by a tenant has an action on the case for an injury to the reversion or freehold.¹⁰⁵

1362 School schedule, refusal to certify, declaration requisites

In an action against school directors for the refusal to examine and certify a schedule of scholars in attendance at a school, the declaration must aver that the plaintiff presented to his directors his or her certificate of qualification before the commencement of school.¹⁰⁶

1363 Seduction, action

An action on the case for seduction is appropriate, notwithstanding the fact that the intercourse was accomplished by force, and that the injury may be made the subject of a criminal prosecution.¹⁰⁷ The unlawful intercourse, whether accomplished with or without force, is the ground of an action for seduction.¹⁰⁸ A husband has a right of action for the seduction of his wife separate and distinct from her right of action for the same offense.¹⁰⁹

1364 Seduction, parties

An action for seduction of a minor female may be brought by either parent or guardian. An action for seduction of a female of full age may be maintained by the father, by any other relative authorized by her, or by herself in her own name.¹¹⁰ In

¹⁰⁴ *People v. Core*, 85 Ill. 248, 252 (1877); Sec. 12, c. 119, Hurd's Stat. 1909, p. 1820.

¹⁰⁵ *Halligan v. Chicago, Rock Island R. Co.*, 15 Ill. 558, 560 (1854).

¹⁰⁶ *Smith v. Curry*, 16 Ill. 147, 148 (1854); Sec. 176, c. 122, Hurd's Stat. 1909, p. 2024.

¹⁰⁷ *Kennedy v. Shea*, 110 Mass.

147, 151 (1872); *Watson v. Watson*, 53 Mich. 168, 171 (1884).

¹⁰⁸ *Dalman v. Koning*, 54 Mich. 320, 322 (1884); *Stoudt v. Shepherd*, 73 Mich. 588, 593 (1889).

¹⁰⁹ *Johnston v. Disbrow*, 47 Mich. 59, 62 (1881).

¹¹⁰ *Watson v. Watson*, 49 Mich. 540, 544 (1883); (10418), C. L. 1897 (Mich.).

Michigan a woman of full age, whether of age or not when debauched, may sue in her name for the seduction.¹¹¹

1365 Seduction, joinder of counts

In an action for seduction a count involving an assault may be joined with a count based upon enticing the plaintiff for the purpose of concubinage.¹¹²

1366 Seduction, declaration requisites

The time of the seduction may be stated in the declaration under a *videlicet* and any seduction may be proved that is within the statute of limitations.¹¹³ The words "seduction" and "debauching" may be used interchangeably in an action for seduction of a servant or a member of the plaintiff's family.¹¹⁴

Under Michigan statute, the declaration for seduction should set forth the natural or legal relationship of the plaintiff to the person seduced. The declaration need not allege that the seduced female is the plaintiff's servant, nor need it allege any loss in consequence of the seduction, as is required at common law.¹¹⁵ In an action for seduction brought upon the authority of a female of full age, the declaration must allege the authority to bring the action.¹¹⁶

SLANDER

1367 Action, nature and scope

The action of slander is transitory.¹¹⁷ Slander is not maintainable upon anything said or written in a legal proceeding which is pertinent and material to the matter in controversy, the same being privileged.¹¹⁸ Malice is an essential element in an action for slander.¹¹⁹ Words which are not in themselves actionable may become so if spoken in connection with a person's business or occupation.¹²⁰

¹¹¹ *Watson v. Watson*, 53 Mich. 178; *Stoudt v. Shepherd*, 73 Mich. 596.

¹¹² *Watson v. Watson*, 49 Mich. 542; *Stoudt v. Shepherd*, 73 Mich. 597.

¹¹³ *Johnston v. Disbrow*, 47 Mich. 61.

¹¹⁴ *Stoudt v. Shepherd*, 73 Mich. 591.

¹¹⁵ (10418), C. L., 1897; *Watson v. Watson*, 49 Mich. 543.

¹¹⁶ *Watson v. Watson*, 49 Mich. 544.

¹¹⁷ *Cassem v. Galvin*, 158 Ill. 30, 35 (1895).

¹¹⁸ *Spaids v. Barrett*, 57 Ill. 289, 291 (1870).

¹¹⁹ *Huson v. Dale*, 19 Mich. 17, 30 (1869).

¹²⁰ *Nelson v. Borchenius*, 52 Ill. 236, 237 (1869).

1368 Parties

In Illinois, an action for slander of or personal injuries to a married woman must be brought in her own name.¹²¹

1369 Declaration requisites, proof

In an action for slanderous words which are not actionable *per se* the *innuendo* in the declaration must refer to some fact or facts stated in the inducement, and the inducement and colloquium must warrant the *innuendo*.¹²² The omission of an averment that the defendant maliciously published a matter is available upon special demurrer, but is cured by verdict.¹²³ After a plaintiff proves the words that have been alleged in the declaration, he may give in evidence, for the purpose of showing malice, the uttering by the defendant of other slanderous words not charged in the declaration which are of a similar import to those that are charged,¹²⁴ provided the subsequent words or libels expressly refer to those which are the subject of the action and constitute no distinct calumny.¹²⁵

1370 Larceny, Narr. (D. C.)

The plaintiff sues the defendant for that whereas, the plaintiff at the time of the committing of the several grievances hereinafter mentioned has always been a person of good name, credit and reputation and for many years has been in the business of dealing in real estate in the city of, District of Columbia, and elsewhere. That the said defendant contriving wickedly and maliciously intending to injure said plaintiff in his good name, fame and credit and to bring him into public scandal, infamy and disgrace among the people of the District of Columbia and to vex and harrass the said plaintiff, said defendant did, on, to wit, the day of, 19., in the city of, District of Columbia, in a certain conversation with one of and concerning said plaintiff and of and concerning the affairs of falsely and maliciously spoke and published of and concerning said plaintiff in the presence of and the hearing to said and divers other persons, false, scandalous and defamatory words, that is to say, that he, meaning plaintiff, had gotten away with dollars of the funds of the said and that he, meaning the de-

¹²¹ Hawver v. Hawver, 78 Ill. 412, 414 (1875).

¹²² Taylor v. Kneeland, 1 Doug. 67, 74 (Mich. 1843).

¹²³ Taylor v. Kneeland, *supra*.

¹²⁴ Thompson v. Bowers, 1 Doug. 321, 329 (Mich. 1841).

¹²⁵ Taylor v. Kneeland, *supra*.

fendant, had located about dollars of funds, meaning and intending and charging thereby that the plaintiff had been guilty of the charge of larceny.

By means of the committing of which said grievances, the plaintiff has been greatly injured in good name, fame and reputation and brought into public scandal, infamy and disgrace, in so much that divers good and worthy citizens have by reason of the grievances aforesaid suspected and believed and still do suspect and believe the plaintiff to be guilty of the larceny mentioned; and by reason of the committing of the grievances from thence till now have wholly refused to have any transactions or business dealings with the plaintiff as they otherwise would have had, to the damage, etc.

1371 Perjury, Narr. (Ill.)

For that whereas, before the committing of the several grievances by the said defendant hereinafter mentioned, a certain action had been depending before, esquire, a justice of the peace within and for the county of and state of Illinois aforesaid, of which said action the said justice had then and there jurisdiction, to wit, at in said county, wherein the defendant in this suit was plaintiff, and the plaintiff in this suit was defendant, and which said action had then and there been lately tried by the said, justice of the peace as aforesaid, and on said trial the said plaintiff in this suit had been and was examined on oath (he, the said defendant in this action, then and there before said oath was administered, having waived any preliminary oath, and having consented that the said plaintiff in this action should be examined on oath, and testify in said cause), in a matter material to the issue in said trial, and having given his evidence as a witness (as by the laws of this state he had a right to do), to wit, at, to wit, at the county and state aforesaid; yet, the said defendant, well knowing the premises, but greatly envying the happy state and condition of the said plaintiff, and contriving, and wickedly and maliciously intending to injure the said plaintiff in his good name, fame, and credit, and to bring him into public scandal, infamy, and disgrace, with and amongst all his neighbors, and other good and worthy citizens of this state, and cause it to be suspected and believed by those neighbors and citizens that he, the said plaintiff, had been and was guilty of the offenses and misconduct hereinafter mentioned to have been charged upon and imputed to the said plaintiff, or any other such offenses or misconduct, and to subject him to the pains and penalties by the laws of this state made and provided against and inflicted upon persons guilty thereof, and to vex, harass, oppress, impoverish, and wholly ruin him the said plaintiff, heretofore, to wit, on the day of, 19.., at, to wit, at the county

and state aforesaid, in a certain discourse which he the said defendant then and there had with the said plaintiff, of and concerning the said plaintiff, and of and concerning the said action, and of and concerning the evidence of him the said plaintiff, given on the said trial, as such witness as aforesaid, in the presence and hearing of divers good and worthy citizens of this state, then and there in the presence and hearing of the said last mentioned citizens, falsely and maliciously spoke and published to, and of and concerning the said plaintiff, and of and concerning the said action, and of and concerning the evidence by him the said plaintiff given on the said trial as such witness as aforesaid, these false, scandalous, malicious, and defamatory words following, that is to say:

You (meaning the said plaintiff) swore falsely, (meaning that he, the said plaintiff), in giving his evidence as such witness, on the said trial, before said justice of the peace as aforesaid, had committed wilful and corrupt perjury.¹²⁶ By means of which scandalous, malicious and defamatory words, so spoken and published, the plaintiff has fallen into disgrace, contempt and infamy and has been greatly injured in his good name and reputation, and divers good and worthy persons have, by reason of the committing of the said grievance, suspected and believed and still do suspect the plaintiff guilty of the words spoken and refuse to have any dealings or association with him, as they otherwise would have had; and the plaintiff has been and is otherwise injured, to the damage, etc.

1372 Woman's character, Narr. (D. C.)

The plaintiff,, being a woman and having a reputation for chastity and virtue, and having always borne the reputation for chastity and virtue among the people in the neighborhood in which she resides, sues the defendant,, for that the said defendant, well knowing said fact, did falsely, maliciously and intending to injure plaintiff in her good name, fame, and reputation, and to bring her into public scandal and disgrace and to cause it to be believed that she, the said plaintiff was an unfit and improper person to associate with persons of good fame, and to subject her to disgrace and degradation, on, to wit, the day of, in the District of Columbia, in certain discourses which the defendant then and there had of and concerning plaintiff, in the presence and hearing of divers persons did falsely, maliciously and wickedly, in the presence of and hearing of said divers persons, speak and publish of and concerning the said plaintiff, and then and there intending that said persons who were at said time present and heard said charge should hear, and who then and there did so

¹²⁶ *Sanford v. Gaddis*, 13 Ill. 329, 330 (1851).

understand the said defendant, the false, scandalous, malicious and defamatory words following, that is to say that she is, meaning that the plaintiff was a prostitute without character and not legitimated; by means of which scandalous, malicious and defamatory words, so spoken and published, the plaintiff has fallen into disgrace, contempt and infamy and has been greatly injured in her good name and reputation, and divers good and worthy persons have, by reason of the committing of the said grievance, suspected and believed and still do suspect the plaintiff guilty of the words so spoken and refuse to have any dealings or association with her, as they otherwise would have had; and plaintiff has been and is otherwise injured, to the damage, etc.

1373 Sparks from locomotive, Narr. (Ill.)

For that whereas, the defendant is a corporation and was on, to wit, the day of, 19.., and for a long time prior thereto had been possessed of a line of railroad, the general direction of which extended north and south through the village of, in the county of and state of Illinois; that said defendant was also possessed of divers locomotive engines and trains of cars attached thereto, which it used and operated on said line of railroad. That, on, to wit, the date aforesaid, he was owner and possessor of a certain general stock of goods consisting of dry goods, clothing, hats, caps, boots, shoes, harness, hardware, groceries, glassware, tinware, queensware, woodenware, cutlery, stoves, showcases, notions, soaps, store fixtures, and other goods, contained in a certain frame building situated and being on the following described parcel of land, to wit, (Set forth legal description) in the village of, in the county of and state of Illinois; that said general stock of goods was of the value of, to wit, dollars; and that said building in which the said stock of goods was contained, was the distance of, to wit, feet east of said railroad.

Plaintiff further avers that, on, to wit, about o'clock in thenoon of the date aforesaid defendant carelessly and negligently operated one of its certain locomotive engines and trains of cars attached thereto, which was going south upon said line of railroad, and which said locomotive was defective; that by reason of such defect in said locomotive engine, sparks and brands of fire were thrown from said locomotive engine to and against and upon, to wit, the building known as the building, which was situated, to wit, the distance of feet east of defendant's said railroad and feet south of the said building containing plaintiff's said stock of goods; and that said fire was communicated from said building to the buildings situated between the said

..... building and the building containing plaintiff's said stock of goods, thence to the said building containing plaintiff's said stock of goods, and then and there wholly destroying and consuming said building and plaintiff's said stock of dry goods, clothing, boots, shoes, hats, caps, harness, groceries, glassware, tinware, queensware, woodenware, cutlery, stoves, show cases, notions, soaps, store fixtures, then and there situated and contained in said building situated on said described parcel of land as aforesaid; and which said stock of goods was of the value of to wit, dollars. Wherefore, etc.

(Maryland)

For that the plaintiff having purchased a farm, known as the farm, in the election districts of county, Maryland, and received a deed for the same, dated the day of, 19.., entered upon and took possession of the timber land lying east of creek, south of the road and west of the property as pointed out by under and by virtue of his said purchase and was in possession thereof as aforesaid at the time of the wrong of the defendant hereinafter complained of; that the defendant owned a railroad between the town of in the state of and the city of, in the state of Maryland, which passed through said county, to the plaintiff's said farm; that large quantities of dry grass, weeds and bushes were negligently suffered by the defendant to be and remain on its right of way along its said railroad near the plaintiff's said farm; that the defendant operated over its said railroad along its said right of way (among other things) locomotive engines containing fire and burning matter; and that the defendant so negligently and unskillfully managed one of its said engines and the fire and burning matter therein contained, while operating said engine over its said railroad along its said right of way near the plaintiff's said farm, that sparks from said fire and portions of said burning matter escaped and flew from said engine and set on fire said weeds, grass and bushes, which was thence communicated to the plaintiff's said timber, and large portions thereof were burned and greatly injured and destroyed, to the plaintiff's damage.

(Mississippi)

That on or about the day of and prior thereto, the defendant company was a common carrier of passengers and freight for hire between Mississippi and Mississippi, both places being located in said county, Mississippi; and that between these points in said county the defendant railway company's

line of railroad was a small station called which said station the defendant company maintained as a freight and passenger station, carrying passengers and freight to and from said station for hire. That plaintiff had prior to and on said date placed at and near said station near the defendant railway company's right of way, a large quantity of stuff commonly called staves, which was unfinished timber from which barrel headings are made; that plaintiff had placed these timbers or headings near said station, as above alleged and adjacent to said defendant company's right of way, as aforesaid, for the purpose of shipping them over the defendant company's line of railroad from to Mississippi and from thence over the railroad and other points.

That the defendant company used engines in the operation of its trains and that said engines were not properly constructed; that the smokestacks of said engines were not properly provided with spark arresters and cones to prevent the throwing of sparks in the operation of said train; and that said smokestacks on the date aforesaid and prior thereto emitted great volumes of sparks of large dimensions when said trains were in operation.

That the defendant company had carelessly and negligently failed to provide the said smokestacks of any of its said engines with spark arresters and cones; or if it had in fact provided any spark arresters at all they were so imperfect and so negligently and carelessly constructed that they permitted great volumes of live, burning coals of great size to be emitted from said smokestacks endangering property along its right of way.

Plaintiff further avers that defendant company negligently and carelessly failed and refused to burn coal in the operation and running of any of its said trains, but carelessly and negligently used and burned wood and fat pine thereby adding to the volume and increasing the size of the sparks emitted from said smokestacks in the operation of its trains; thereby increasing the danger to plaintiff's property along and adjacent to its right of way as above alleged.

Plaintiff alleges that on or about the date aforesaid the defendant company was operating its trains on its said line, as aforesaid, and that its engine number was pulling a heavy train loaded with by station towards and that as said engine passed station thus heavily loaded, as aforesaid; that said defendant company by its employees so carelessly and negligently handled and operated said engine that they caused said engine to exhaust heavily as it passed by said station and by plaintiff's staves or headings as aforesaid; and that because of their said negligent handling of said engine, because of the unfit condition of said engine as aforesaid and because of the defendant company's negligence and carelessness in not providing the smokestacks of

said engine number with a spark arrester and cone to prevent the emission of sparks as aforesaid, and because of defendant company's careless and negligent use of the wood and fat pine in firing said machinery and engine, as aforesaid, a great volume of live and burning coals of large size was emitted from said smokestacks and set fire to plaintiff's staves and headings, from which a large quantity of said staves or headings were burned and totally destroyed; and that from said fire, which was a direct result of the defendant company's carelessness and negligence, as aforesaid, plaintiff lost the following amount of staves or headings, to wit: (Insert itemized list) Wherefore, etc.

1374 Sparks from traction engine, Narr. (Mich.)

For that whereas, on, to wit, the day of 19.., said plaintiff was the owner in fee simple of (Give legal description of property) with the frame buildings thereon situated, to wit, one story frame house by feet with wing by; one story frame house by feet, with wing or kitchen, by feet, one woodshed, by feet; one toolshed by feet containing logging chains (State other contents); said buildings and personal property being of great value, to wit, all of the value of dollars; and said defendant on the day and year aforesaid, was the owner and was running and operating a traction engine, which, when fired up, would run by its own power; that defendant, in running and operating said steam traction engine in and along the public highways used large fires which emitted and gave off large quantities of sparks of fire through the smokestack of said engine.

And whereas, at the time of the committing of the grievances hereinafter set forth, it became and was the duty of defendant to have used upon said smokestack, a hood or spark arrester, which would have prevented the escape of sparks of fire, or in some other way to have prevented their escape, so that when the said defendant was running said engine along the highways in front of plaintiff's premises and buildings, fire would not have been communicated by sparks from defendant's traction engine to the aforesaid property of the plaintiff. But the said defendant not regarding his duty in that behalf, did not have a hood or spark arrester on said engine sufficient to prevent the escape of sparks of fire, or did not in any way prevent sparks of fire from escaping from the smokestack of said engine.

And plaintiff avers that, to wit, the day of the said defendant, by his agent and servant was running and operating said traction engine in and along the public highway in front of plaintiff's premises, without using

any adequate means to prevent escape of sparks of fire from the smokestack caused the same to be stopped in front of and within feet of plaintiff's buildings, and the sparks of fire from the smokestack of said engine were thrown upon the plaintiff's aforesaid buildings and said buildings together with the personal property aforementioned, were thereby set on fire and totally consumed, to the plaintiff's damage of dollars and therefore he brings suit.

1375 Strikes, action

Special ownership of property destroyed by mobs and riots is sufficient to give a right to maintain an action under the Mobs and Riots act of 1887.¹²⁷ The liability for damages sustained from mobs, etc., rests upon public policy and not upon the doctrine of negligence.¹²⁸

1376 Strikes, Narr. (Ill.)

For that whereas, on, to wit, the day of, 19.., at, to wit, in the county aforesaid, plaintiff was, and for a long time prior thereto had been the owner of the real estate and story brick building located and being at the corner of and streets in the city of; that said real estate and building were then and there occupied by K as tenant of the plaintiff under a lease which provided that the plaintiff should replace in said building any and all of the plate glass therein contained that might or should become broken or destroyed.

Plaintiff further avers that several weeks prior to the day of, 19.., the employees of the said K went out on a strike and that said strike and controversy between the employees of said K and said company had continued with great virulence and still continuing on said day of, 19..; that as a result of said strike and the endeavors of K to employ other persons in the place of the strikers, the place was picketed by the striking employees and many violent acts were perpetrated, in so much that said building and premises and the employees of K had to be guarded by the police of the defendant city in order to protect said building and premises from damage and the employees from injury; of all of which the defendant city had notice.

Plaintiff further avers that, on, to wit, the day of 19.., in the afternoon of said day, the defendant city negligently and carelessly failed to furnish sufficient

¹²⁷ Pittsburg, Cincinnati, Chicago & St. L. Ry. Co. v. Chicago, 242 Ill. 178, 187 (1909).

¹²⁸ Sturges v. Chicago, 237 Ill. 46, 52 (1908).

policemen to guard and protect said building and premises or to otherwise guard and protect the same, and that while the said building and premises were so insufficiently guarded and protected, a large mob or riot of more than twelve persons assembled around about said building in the streets and on the sidewalks and with brickbats, stones and other missiles, broke and destroyed the following panes of plate glass, contained in said building, viz.: (Describe property) that the value of said plate glass, so broken and destroyed, and the damage to said building was then and there the sum of (\$.....) dollars.

Plaintiff further avers that such destruction and injury was not in any way occasioned or aided, sanctioned or permitted by the carelessness, neglect or wrongful act of the plaintiff or of his tenant, K, and that both plaintiff and said K did everything in their power and used all reasonable diligence to prevent such damage.

Plaintiff avers that afterwards, on, to wit, the day of, 19.., and within thirty days after the damage aforesaid was done, he presented to the defendant city of, notice of his claim for damages, in and by said notice notifying the defendant city of, that he was the owner of the building at the corner of and streets in the city of, then and there occupied by K as tenant; that on the day of, 19.., the plate glass contained in said building was broken in consequence of, and by a mob or riot composed of more than twelve persons, as follows (Describing the property as hereinbefore set forth); that the damage and destruction was not occasioned by, or in any way aided, sanctioned or permitted by the carelessness, neglect or wrongful act of the plaintiff, and that he used all reasonable diligence to prevent such damage; that the damage done amounted to (\$.....) dollars; and that he claimed and demanded from the defendant city of, three-fourths of said sum, or the sum of (\$.....) dollars, pursuant to the statute in such case made and provided.

Plaintiff further avers that the defendant city of failed and refused to pay to the plaintiff said sum of (\$.....) dollars, or any part thereof, and still refuses so to do, to the damage of the plaintiff of (\$.....) dollars, and therefore he brings suit in accordance with the form of the statute in such case made and provided.

b

For that whereas, to wit, on the day of, 19.., said plaintiff was a corporation engaged in the manufacture and sale of soap, with a large and extensive mail order business by and through which said product was disposed of.

That on the day and year last aforesaid the said plaintiff was possessed as of its own property of a large quantity of goods, merchandise, supplies and property, including the following described property, to wit: (Give itemized statement of property destroyed with amount of each item) of great value, to wit, of the value of \$....., which was then and there located and situate at, to wit, in the building known as the rear of street within the territorial limits of the said city of

And the plaintiff alleges that, on, to wit, the day and year aforesaid, and within the corporate limits of the city of, aforesaid, a large number of persons, of the number of more than twelve, and of the number of, to wit, persons, did riotously and tumultuously and unlawfully and wrongfully assemble together of their own free will and authority, with the common intent mutually to assist each other against anyone who might offer resistance to their designs, and with the common intent and design to unlawfully enter upon the said premises of plaintiff, at the place aforesaid, to unlawfully and wrongfully commit damage and waste to plaintiff's said property aforesaid; and then and there, without any right or authority, the said assemblage of persons did so congregate as aforesaid, with the common design as aforesaid, and did then and there, in the furtherance of such common design, unlawfully enter upon the plaintiff's said premises at the place aforesaid, in the execution of their private designs, and did then and there in a riotous and tumultuous manner commit waste and damage to the said property of plaintiff and wholly destroy the said property of plaintiff, and render the said property of no value whatsoever, to wit, in the building and at the time and place aforesaid.

That said injury and destruction and damage was not occasioned or in any way aided, sanctioned or permitted by any carelessness, neglect or wrongful act on the part of the said plaintiff or its agents, or through any neglect on the part of said plaintiff or its agents, to use reasonable diligence to prevent said injury and destruction; and said plaintiff avers that within thirty days next after the time of said damage and destruction of said property said plaintiff on a certain day, to wit, the day of, 19.., gave due notice to said defendant of said damage and destruction and then and there, on, to wit, the day and year last aforesaid, demanded of said defendant payment of three-fourths of the amount of damages sustained by said plaintiff by reason of such injury and destruction, three-fourths of the sum of (\$.....) dollars, to wit, the sum of (\$.....) dollars, whereby, and by reason of the premises, and by force of the statute of the state of Illinois in such case made an provided, it then and there, to wit, on the day of, 19.., at, to wit, the county aforesaid, became and was the duty of said defendant to pay to said plaintiff the said sum of

..... (\$.....) dollars; yet the said defendant, on, to wit, the day and year last aforesaid, at the county aforesaid, wrongfully neglected and refused to pay said plaintiff the said sum of (\$.....) dollars, or any part thereof, by reason of which said wrong and neglect said plaintiff hath suffered damages in a large sum, to wit, the sum of (\$.....) dollars, wherefore, it brings its suit, etc.

1377 Telegrams, negligent transmission, action

A telegraph company is liable for all direct damages which result from the negligent failure to transmit a message, as written, within a reasonable time, unless the negligence is in some way excused, where the message, as written and read in the light of all known usage in the commercial correspondence, reasonably informs the operator that the message is one of business importance and discloses the transaction so far as is necessary to accomplish the purpose for which it is sent.¹²⁹

1378 Telegrams, negligent transmission, Narr. (Miss.)

That the plaintiff is a resident of, county, Mississippi; that the defendant is a telegraph and cable company engaged in the transmission of messages from points in various portions of the United States and in foreign countries; that it has a regular office and agents in county, Mississippi, on whom service of process may be had.

That the plaintiff is engaged in buying and selling spot cotton; that he keeps on hand spot cotton for sale to the spinners of this country and in foreign cities; that having on hand spot cotton for sale upon the day of he delivered to the a certain message on said date addressed to in the following words: (Set forth message *in haec verba*).

That said was a broker in said engaged in the sale of spot cotton; that the plaintiff had made many sales of actual spot cotton as aforesaid; that the said defendant company has transmitted many messages from the plaintiff to the said and other cotton buyers in foreign cities; that it is well acquainted through its officers and agents with the business carried on by the plaintiff and is thoroughly aware of the importance of messages delivered to it by the plaintiff for transmission; that the plaintiff in person delivered said message in the city of to the agent of said defendant company at o'clock in noon on advising

¹²⁹ Providence - Washington Ins. Co. v. Western Union Tel. Co., 247 Ill. 84, 91 (1910).

the agent of said company of the contents of said message, the same being in cipher, and the said plaintiff advising the defendant's agent of the importance of the same and the purpose of sending the same and the damage which would accrue to the plaintiff by reason of any delay in transmission and delivery of said message.

That the defendant through the general conduct of the business was well aware of said fact; that the defendant's agents and servants represented to the plaintiff that within about minutes said message would be transmitted and delivered to its address; that the plaintiff paid all proper charges upon said message; that it was the duty of the defendant to transmit and deliver the same within a reasonable time, and that minutes would have been a reasonable time.

Plaintiff, however, alleges and avers that said message was unreasonably delayed; that it was not delivered to its destination until o'clock in the noon, after the close of the markets of said day; that the failure to deliver said message was the result of gross and willful negligence on the part of the agents and servants of said defendant company; that upon the next morning the price of cotton had declined; that had the defendant delivered said message any time during the day of said cotton would have been disposed of and could have been disposed of at but that on account of said delay, the plaintiff was under the necessity of selling said cotton the following day at, making a loss of per bale, thereby entailing upon the plaintiff a loss of dollars; that all of said loss was sustained solely on account of the negligence and willful conduct of the defendant as aforesaid; that due and timely notice was given to the defendant of said claim for damages and payment of the same has often been demanded, but that the defendant fails and refuses to pay said claim, or any part thereof. Wherefore, etc.

TRANSPORTATION

1379 Bill of lading, limitation

At common law and under United States statutes the initial common carrier, engaged in interstate commerce, who receives a shipment to be made beyond his line is liable for damages to the shipment caused by any carrier over whose line the shipment passes, from the time it is delivered until its delivery to the consignee at the point of final delivery.¹³⁰ A bill of lading is a written acknowledgment of the receipt of goods and also an agreement for a consideration to transport and deliver the goods

¹³⁰ Fry v. Southern Pacific Co., Interstate Commerce act (U. S. 247 Ill. 564, 573 (1910); Sec. 20, Comp. Stat. 1901, pp. 31, 69).

at the specified place to a person therein named, or his order. A limitation that the carrier shall not be liable beyond its own lines is valid in Illinois, in that part of the bill of lading which constitutes an agreement to deliver the goods to the next carrier to be carried to its destination; but the burden is on the carrier to show by evidence other than that contained in the bill of lading that the limitation of the common law liability was understandingly assented to and the risk assumed by the shipper, regardless of whether the bill of lading or contract of shipment consists of one or more instruments. The statute which prohibits common carriers to limit their common law liability has reference to and renders void only that portion of the bill of lading which acknowledges the receipt of the property.¹³¹ The right of a railroad company to limit its liability by contract does not extend to liability for its gross negligence or willful misconduct; and a limitation in a bill of lading which attempts to limit liability beyond the legitimate scope is void as against public policy.¹³²

1380 Jurisdiction

State courts have concurrent jurisdiction with Federal courts in cases arising under section 20 of the Interstate Commerce act of 1887, where the amount exceeds two thousand dollars; in cases involving less than that sum, the state courts alone have jurisdiction. And this jurisdiction extends to municipal courts.¹³³

1381 Cattle, feeding and watering, action

A common carrier is liable for the failure to provide suitable and safe facilities for watering and feeding stock while in transit, and of this liability it cannot relieve itself by contract.¹³⁴

¹³¹ Illinois Match Co. v. Chicago, R. I. & P. Ry. Co., 250 Ill. 396, 400, 402 (1911); Sec. 33, Fencing and Operating Railroads act (Par. 96, c. 114, Hurd's Stat. 1909, p. 1755).

¹³² Fry v. Southern Pacific Co., 247 Ill. 574.

¹³³ Fry v. Southern Pacific Co., 247 Ill. 575, 578.

¹³⁴ Chesapeake & Ohio Ry. Co. v. American Exchange Bank, 92 Va. 495, 500 (1896).

1382 Cattle, injured and lost, Narr. (Va.)

For this, to wit, that heretofore, to wit, on the day of, in the year 19.., the said defendants were common carriers, engaged in carrying live stock, and animals from a point in the state of to a point in the state of Virginia, and the plaintiff was a dealer in horses and other animals in the city of, in the state of Virginia, and on the day and year aforesaid, the defendant, the company, received of at the in, a carload of horses, which horses were owned by and were the property of the plaintiff to be transported from the in to, Virginia, and the said defendant issued a bill of lading to the said for the said horses, in which bill of lading the consignee was given as destination, Virginia, which bill of lading was transmitted by to the plaintiff, who was from the date thereof and now is the lawful holder thereof.

That the line of the company does not extend to, Virginia, but terminates at, Virginia, where it connects with the line of the company, and that it was understood and agreed between the company, and the company that the last named company should receive the said horses of the first named company, at, Virginia, and carry the same to their destination at, Virginia, that it was understood and agreed between the plaintiff and the said defendants that the said horses should be shipped over the company and the company from the in to, Virginia.

And according to said understanding the said horses were shipped over the line of the company from the in, to, Virginia, and were there delivered by the first named company to the company and by said last named company carried from, Virginia, to, Virginia, the point of destination.*

Whereby it became the duty of the defendants to transport the said horses to the plaintiff at, Virginia, and it was the duty of the defendants not to confine the said horses in its cars for a longer period than twenty-eight consecutive hours, without unloading the same for rest, water and feeding, for a period of at least five consecutive hours, unless prevented from so unloading by storm or other accidental causes.

Nevertheless in disregard of the said duty, the said defendants confined the said horses in their cars for a longer period than twenty-eight consecutive hours, without unloading the same for rest, water and feeding, for a period of at least five consecutive hours, although the defendants were not prevented from so unloading by storm or other accidental causes.

Whereby and by reason of the defendants negligence, and disregard of their said duty, all of the said horses were made sick and two of said horses died and one or more of the said horses were made lame and a considerable number of the said horses became so starved and hungry that they chewed and ate the tails of one another and were thereby greatly injured and damaged, by reason of said breach of duty and negligence of both of said defendants.

2. (Consider first count to star as here repeated the same as if set out in words and figures.)

Whereby it became and was the duty of the defendants to transport the said horses with all reasonable dispatch to the plaintiff at, Virginia.

But the said defendants carelessly and negligently failed to transport the said horses with all reasonable dispatch from the in, to, Virginia, and greatly delayed the transportation of said horses on the route from the in, to, Virginia, on the line of the company and the company, in consequence of which delay said horses became sick, sore, lame and hungry, so that two of them died as the effect of said breach of duty and negligence of the defendants, and many of the horses had their tails eaten off by each other, owing to their great hunger, caused by said delay, and by the said carelessness and negligence of the said defendants.

3. (Consider first count to star as here repeated the same as if set out in words and figures.)

And the said defendants knew that it was necessary to feed the said horses at proper times during the said journey and knew that no agent of the plaintiff, or other person, charged with the duty of feeding said horses, accompanied them, except the agents and employees of the defendants, and the said defendants, according to their usual practice and custom, undertook to properly feed the said horses during the said journey, and it was their duty to so feed them.

Nevertheless, the said defendants carelessly and negligently failed to properly feed the said horses during the said journey while the said horses were in their care and custody, by reason whereof the said horses became sick, sore, lame and hungry, so that two of them died as the effect of said breach of duty and negligence of the defendants, and many of them had their tails eaten off by each other, owing to the great hunger, caused by the said breach of duty, carelessness and negligence of the said defendants.

By reason whereof, the said plaintiff has been greatly injured and damaged and has suffered large losses owing to the death of two of said horses, and owing to medicine and treatment for the horses which were made sick as aforesaid, and owing to the expense of keeping and caring for the sick horses and for those which were injured and made unsalable by reason of having their

tails eaten by the other horses, and owing to the expense of insurance and stabling of the said horses while they were made unsalable as aforesaid.

To the damage of the plaintiff \$. And, therefore, he brings his suit.

1383 Goods damaged, Narr. (Ill.)

For that whereas, before and at the time of the delivery of the goods and chattels to said defendant, as hereinafter next mentioned, it was, and from thence hitherto has been possessed of, and using and operating a certain railroad, and was and still is a common carrier of goods and chattels, for hire, to wit, from to, at, etc.:

And whereas, also, the plaintiff, whilst the defendant was such common carrier as aforesaid, to wit, on the day of, 19.., at, to wit, at etc., caused to be delivered to the defendant, and the defendant then and there accepted and received of and from the plaintiff divers goods and chattels, to wit; (Describe property) of the said plaintiff of great value, to wit, of the value of (\$) dollars, to be safely and securely carried and conveyed by the said defendant from aforesaid to aforesaid, and there, to wit, at, etc., aforesaid, safely and securely to be delivered for the said plaintiff for certain reasonable reward to the said defendant in that behalf. Yet the said defendant, not regarding its duty as such common carrier as aforesaid, but contriving and fraudulently intending craftily and subtly to deceive, defraud and injure said plaintiff in this behalf, did not, nor would safely or securely carry or convey the said goods and chattels, to wit, the (Describe property) from aforesaid to aforesaid, nor there, to wit, at aforesaid, safely or securely deliver the same for the plaintiff, but on the contrary thereof, the defendant so being such common carrier as aforesaid, so carelessly and negligently behaved and conducted itself in the premises, that by and through the carelessness, negligence and default of the defendant in the premises the said (Describe property) aforesaid, being of the value aforesaid, afterwards, to wit, on the day and year aforesaid, to wit, at, etc., afterwards became and were greatly injured, damaged, and spoiled, to the great loss of the plaintiff, to wit, at, etc., aforesaid.

2. And whereas, also, heretofore, to wit, on the day and year aforesaid, to wit, at, etc., aforesaid, the plaintiff, at the special instance and request of the defendant, caused to be delivered to the defendant certain other goods and chattels, to wit, (Describe property) of like number, quantity, quality, description and value as those in said first count mentioned of the plaintiff, to be taken care of, and safely and securely carried and conveyed by the said defendant to, aforesaid, and

there, to wit, at, aforesaid, to be safely and securely delivered by the defendant for the plaintiff, within a reasonable time the next following for certain hire and reward to the defendant in that behalf; and although the defendant then and there accepted, and had and received the said last mentioned (Describe property) aforesaid, for the purpose and the terms aforesaid; yet the defendant not regarding its duty in that behalf, but contriving and fraudulently intending, craftily and subtly to deceive and defraud the plaintiff in this respect, did not nor would, within such reasonable time as aforesaid, take care of, or safely or securely carry and convey the said last mentioned (Describe property) to aforesaid; and by means of the negligence and improper conduct of the defendant in that behalf the said last mentioned (Describe property) were long and unreasonably delayed in their delivery to the plaintiff, and were furthermore greatly damaged, injured and spoiled to the great loss of the plaintiff, to wit, at, etc., aforesaid. To the damage of the said plaintiff of dollars, and therefore he brings his suit, etc.

1384 Goods lost in transit, Narr. (Ill.)

For that whereas, on, to wit, the day of, 19.., the plaintiff was a corporation engaged in business of manufacturing and selling and owning and operating a factory in the township of, county, Illinois, and the defendant was then and there a railway corporation operating a line of railway in the state of Illinois, and extending into and through said township of and was then and there a common carrier of goods and chattels for hire; that said plaintiff, on, to wit, the day of, 19.., at its said factory, caused to be delivered to the said defendant, and the said defendant then and there accepted and received of and from the said plaintiff, certain goods and chattels, to wit: (Insert description of goods and chattels) of the value of dollars, the said being then and there in good condition to be safely and securely transported by said defendant from the factory of said plaintiff aforesaid to county, in the state of, and there safely and securely to be delivered for said plaintiff to on a certain side track or siding commonly known as "....." in said county, in the said state of for certain reasonable reward to said defendant in that behalf; yet the defendant not regarding its duty as such common carrier as aforesaid, did not safely or securely transport the said, from the factory of the plaintiff aforesaid, to county aforesaid, nor there safely or securely deliver the same for said plaintiff to said... .. on said siding in said county, in the state of, nor to any other person nor at any other place

for said plaintiff, but on the contrary thereof said defendant so carelessly and negligently behaved and conducted itself that by and through its carelessness, negligence and default, the said being of the value aforesaid, afterwards, to wit, on the day and year aforesaid, became and were and are wholly lost to the said plaintiff, to the damage, etc.

2. And whereas, also, heretofore, to wit, on the day and year aforesaid, at county aforesaid, the plaintiff at the request of the defendant, caused to be delivered to the said defendant certain other goods and chattels, to wit, of a like number, quantity, quality, description and value as those in the said first count mentioned of the said plaintiff, to be taken care of and safely and securely carried and conveyed by the said defendant to county aforesaid, and there, to wit, at county aforesaid, to be safely and securely delivered by the defendant for the plaintiff within a reasonable time then next following, for a certain hire and reward to the defendant in that behalf; and although the said defendant then and there accepted, and had and received said last mentioned, for the purpose and on the terms aforesaid, and although a reasonable time for the carriage, conveyance and delivery thereof as aforesaid, has long since elapsed; yet the said defendant, not regarding its duty in that behalf did not nor would within such reasonable time as aforesaid, or at any time afterwards take care of or safely or securely carry and convey the said last mentioned to county aforesaid, nor there, to wit, at county aforesaid, safely or securely deliver the same for the said plaintiff; but hitherto has wholly neglected and refused so to do, and by means of the negligence and improper conduct of the said defendant in that behalf, the said last mentioned have not been delivered to, nor for, the said plaintiff at county aforesaid, or elsewhere, and are wholly lost to the said plaintiff.

3. And whereas, also, afterwards, to wit, on the day and year aforesaid, at the county aforesaid, the said defendant at its special instance, and request, had the care and custody of certain other goods and chattels, to wit, of a like number, quantity, quality, description and value as those in the said first count mentioned of the said plaintiff; yet the said defendant, not regarding its duty in that behalf, did not, nor would it, while it had the care and custody of the aforementioned, as aforesaid, take due and proper care, of the same but wholly neglected so to do and took such bad care thereof that afterwards, to wit, on the day and year aforesaid, the aforementioned became and were and are wholly lost to the plaintiff. To the damage, etc.

1385 Vicious animals, action

An action on the case, and not that of trespass, is maintainable for an injury done by a vicious animal, where the owner of the animal has notice of its vicious propensity.¹³⁵

1386 Vicious animals, declaration requisites

In an action for an injury by a vicious animal the declaration must aver a *scienter*.¹³⁶

1387 Vicious animals, Narr. (Mich.)

For that whereas, the said defendant heretofore, to wit, on the day of 19.., and for a long space of time theretofore, at the township of in the county of and state of Michigan, was the owner and keeper of a certain large dog, and permitted and allowed said dog at all times to go at large, and did not keep said dog tied up or otherwise restrained as was said defendant's duty. That said dog then and there, and for a long space of time theretofore, was vicious and was used and accustomed to attack and bite mankind, and said defendant then and there, and for a long space of time theretofore well knew the habits of said dog and that it was vicious and used and accustomed to attack and bite mankind. That thereupon and by reason thereof it became and was the duty of said defendant at all times to keep said dog tied or otherwise restrained and not to permit it to go at large. But, notwithstanding the said knowledge of the habits and viciousness of said dog, and said defendant's duty to restrain it from going at large, still he permitted and allowed said dog to go at large and unrestrained at all times, and particularly upon the date next hereinafter mentioned.

Plaintiff further alleges that on said day of aforesaid, in the day time of said day she was walking towards and approaching the dwelling house of the said defendant in said township, county and state aforesaid and while on the steps leading to the porch, the said dog aforesaid, so owned and kept by the said defendant as aforesaid and when said dog was at large and not tied or otherwise restrained and without fault or negligence of said plaintiff, viciously attacked and did then and there assault and bite said plaintiff on both of her ankles, feet and legs below the knees, and did then and there terribly lacerate, hurt, wound and injure the said plaintiff. And thereupon and thereby she, the said plaintiff, on the portions of her anatomy aforesaid was greatly bruised, torn and lacerated; and that said plaintiff thereupon

¹³⁵ *Stumps v. Kelley*, 22 Ill. 140, 143 (1859).

¹³⁶ *Stumps v. Kelley*, *supra*.

and by reason thereof then and there became and was sick, sore, lame and disordered, and so remained and continued for a long space of time, to wit, from thence hitherto and will so remain and continue for a great length of time hereafter; and plaintiff alleges that her said injuries are permanent and may ultimately prove fatal, and that she will never recover therefrom, and that it may become necessary to amputate one or both of her legs because of said injury.

Plaintiff alleges that at the time and place aforesaid her right leg was bitten by said dog, to wit, inches above the lower edge of the outside ankle almost entirely around her leg. That the skin, muscles and tissues were bitten, torn and lacerated to a great depth, to wit, inch. That the flesh and tissues became and were and still are greatly inflamed, swollen and ulcerated containing great quantities of pus. That her said leg below the knee became and continued for a great length of time to be black and blue, and discolored both externally and internally extending down and along the middle of her right foot for a considerable distance, to wit, for inches. That her left leg between the knee and the foot and particularly at points respectively, to wit, inches being the lower edge of the external ankle and above the posterior part of the external ankle, was bitten by said dog around the entire leg and that by reason thereof and the injuries aforesaid said leg then and there became and was and still is sore, red, inflamed and swollen; that the skin, muscles and tissues of said leg were bitten, torn and lacerated to a great depth, to wit, inches, that the flesh and tissues became and were and still are greatly inflamed, swollen and ulcerated, containing great quantities of pus. That said leg below the knee became and continued for a great length of time to be black and blue and discolored, both externally and internally and extending down and along the middle of her left foot for a considerable distance, to wit, inches.

That by reason of said injuries aforesaid said plaintiff suffered and still suffers, and will continue to suffer for an indefinite length of time hereafter great bodily pain and mental pain, anguish and humiliation; that she is severely and permanently wounded and injured and disfigured for life; that plaintiff's whole nervous system was and is greatly and permanently injured by the shock, fright and injuries aforesaid from and by said assault and injury of said dog. That she has no appetite, cannot sleep and is otherwise severely and permanently injured. That plaintiff before said injury was a sound and healthy person, both in mind and body; that her mental faculties and physical health have been and now are permanently injured and shattered, and her blood poisoned and contaminated by reason of said injuries as aforesaid. That she has expended large sums of money for medicine and attendance of physicians; that she has lost a great deal of time and is unable

to work and perform her usual duties, labor and occupation. Plaintiff further alleges that she was absolutely without fault or negligence in the premises and that she did not contribute in any manner to said injury.

The plaintiff therefore alleges that she is entitled to damages by reason of the premises and under and by virtue of the statute in such cases made and provided the same being section 5593 of Miller's Compiled Laws of 1897 for the state of Michigan. To the damage, etc.

1388 Water supply, cut off, Narr. (Miss.)

That said is a corporation organized and existing under and by virtue of the laws of the state of Mississippi, and domiciled in the city of in said state; that on the day of, 19.., pursuant to law and proper authority granted by the municipal authorities of the of a contract was entered into and between said and the for the purpose of furnishing water for domestic purposes, and for protection against fire in said, and that on the day of, 19.., a supplemental contract was entered into in that behalf; all of which appears by reference to a copy of said contract and supplemental contract filed as a part hereof marked exhibit "A."

That under said contracts the said constructed certain mains and fire hydrants in the of state aforesaid, which were located by the municipal authorities of the; all of which appears by reference to a resolution of order accompanying said contracts.

That under the said contracts, the said contracted and agreed to furnish said and inhabitants thereof, where such pipes and mains were laid, first class fire protection and an adequate supply of water for the greatest protection against fire; all of which appears by reference to the provisions of the contracts themselves.

That plaintiff is a citizen of and owns the (Describe property) in said upon which is situated a valuable frame residence owned and occupied by him; he was also seized and possessed of a large amount of personal property situated and contained in said building consisting of household and kitchen furniture, wearing apparel and other effects; that in pursuance of law and the contracts aforesaid, under which the said acquired its franchise for the year plaintiff as the owner of said property entered into a contract with said company to supply his residence with water for domestic purposes; that the water for these purposes was conducted by the pipes connected with the mains of said company through said residence and was distributed throughout the residence for use in

the bath rooms and in other places thereof; that for this privilege and under these contracts, plaintiff paid to the said company for the use of the water thus to be supplied on said premises the sum of dollars per quarter, payable in advance, the last quarter ending; and that under these contracts it was the duty of said company to supply to the plaintiff on said premises, at all times during said continuation of said contracts the water contemplated by them.

That in a bath room on the second story in the said residence was installed an apparatus for heating water by burning gas, commonly called an instantaneous heater which was connected with the said water pipes leading into said residence and with gas pipes leading into said residence; that said heater was so constructed that it could not be used to burn gas without a sufficient flow of water through the pipes connected therewith; that heaters of this character were and are in common use in the of and are all connected with the water pipes of said; that especially was this the case as to the block or square upon which the residence of the plaintiff was situated and the adjacent blocks and squares thereto; that all of this was well known to the said and the officers, agents and employees thereof; and that it was also well known to them that the use of such a heater without a sufficient flow of water was dangerous, and that it would necessarily result in a conflagration.

That on day of, 19.., about o'clock noon, plaintiff's house being thus connected with the system of water works of said and the gas heater being properly installed therein, plaintiff turned and ignited the gas in said heater for the purpose of obtaining warm water in the bath tub; that at that time the water was freely flowing through the pipes and that there was a sufficient supply thereof; that after turning on and igniting the gas for thus obtaining warm water, a period of five to ten minutes is required for an ordinary sufficient supply; that after this turning on the water, the plaintiff left the bath room for a very short space of time intending to return and shut off the gas and flow of water when a sufficient supply of water had been obtained; that almost immediately after plaintiff had thus turned on the water and ignited the gas in said heater the said, through the defendant, its superintendent, wrongfully, unlawfully and without notice to plaintiff, or any one on the premises, and without giving any warning whatever, closed a valve near the plaintiff's residence and thereby cut off the supply of water, and instantly the water ceased to flow through the pipes connected with said heater, and the necessary and immediate result was a conflagration caused by the burning of the gas without any water supply in the heater, and this conflagration caused plaintiff's residence to take fire.

That the plaintiff promptly discovered the absence of the

flow of water and the conflagration and endeavored to extinguish the fire, and although, he made every effort to obtain water from faucets in the house, he was unable to obtain any water, because none was flowing through the pipes, and for this reason he was unable to extinguish the fire, and the same rapidly spread and destroyed a large part of the building and greatly damaged the entire building and it also destroyed and damaged a large amount of valuable personal property owned by plaintiff and situated in said building, and in addition to this plaintiff was injured and burned in his efforts to extinguish the fire.

That it was the duty of said, a public service corporation, to supply his premises with a constant flow of water through the said pipes provided therefor; that it was wrongful and unlawful and in violation of law, and also in violation of the rules and regulations concerning the duty of said defendant to cut off said supply of water without warning or notice; that there was no emergency for thus cutting off the water, and the act of said defendant and the said was not only a violation of law and the rules applicable to the duty of defendant company and the custom in such cases, but that it was contrary to the most obvious rules of ordinary prudence; and that they well knew how the residence was occupied and used and had ample opportunity to give notice if the cutting off of the water at that time was necessary.

That if plaintiff had received any previous warning or notice he would not have turned on the water and ignited the gas in said heater; that after having done so, if he had been warned or notified in any way that the water supply would be or was being cut off by the defendants, he could and would have promptly shut off the gas, and that thus the fire and consequent loss would have been prevented; that the plaintiff therefore avers that such a fire was caused solely by the wrongful, unlawful and grossly negligent conduct of the defendants and without any fault or neglect on his part.

By reason of said fire a large part of said building was destroyed and the remainder of the building was greatly damaged, the total amount of damages to said residence being the sum of dollars; that also by reason of said fire the extent of plaintiff's loss as to his personal property damaged was and is the sum of dollars; that also the plaintiff then and there sustained by reason of inconvenience and loss of the use of the said building and of the use of his furniture, fixtures, and other personal property therein to the amount of dollars; and that plaintiff also suffered great mental and physical pain, inconvenience and discomfort and sustained damages therefrom in the sum of dollars. All of which loss and damages were sustained by plaintiff in consequence of the carelessness, gross negligence and wilful misconduct of the defendant aforesaid.

1389 Wrongful discharge effected by employer's liability insurer, Narr. (Ill.)

For that whereas, on or about the day of,, said plaintiff was in the employ of a corporation or company known as the U company; that on or about the said date said plaintiff, while in the employ of said U company, received a serious and permanent injury to one of his eyes, then and there losing the sight of the same; that afterwards, to wit, on or about the day of, 19.., said plaintiff brought an action in the court of county, in the state of Illinois, against said U company, for and on account of said injury, which action is still pending therein, claiming in said suit that the said injury so received by the plaintiff was caused through the negligence of said U company; that after said suit against said U company had been commenced by plaintiff as aforesaid, he, the said plaintiff, remained in the employ of said U company until, to wit, the day of, 19.., when he was discharged from said employment by said U company, as hereinafter set forth.

Plaintiff further avers that the defendant, on or about, 19.., through its servants, agents and employees, maliciously, wrongfully and without any reason or lawful cause, and for the purpose of injuring the plaintiff, demanded as of and from the said U company that they immediately discharge the plaintiff from such employment, as such servant, and thereby then and there maliciously, wrongfully and for the purpose of injuring plaintiff procured his discharge from such employment.

Plaintiff further avers that said U company at the time of such discharge was well satisfied with the services of plaintiff, and had no intention, cause or reason to discharge the plaintiff, and would not have discharged him from such employment were they not compelled to do so by said defendant; that said defendant at the time was defending said U company in the suit against it by said plaintiff, and that said defendant at that time then and there informed said U company that the said plaintiff must be discharged at once from his said employment; that the said defendant did not want the said U company to give employment to the plaintiff, and thereby enable him to earn money to carry on his suit against the said U company, said suit being defended by said defendant under its contract with the said U company.

Plaintiff further avers that he requested said defendant to revoke its order to the U company to discharge the plaintiff, and that the said defendant refused to comply with said demand and request, unless the plaintiff would dismiss his suit against said U company, and further threatened the plaintiff that unless said suit was discontinued that he would not be permitted to work for said U company for a period of ten years.

Plaintiff further avers, that by reason of such discharge as above set forth, and without any fault on his part, he was unable to secure employment until, to wit, the day of, 19..; that at the time of his discharge as aforesaid he was receiving wages at the rate of, to wit, \$. per day; and that by reason, and on account of said discharge as aforesaid, plaintiff has suffered great damages to his character and reputation. Wherefore, etc.

SPECIAL DEFENSES AND PLEAS

1390 Accord and satisfaction, pleading

At common law, on account of the equitable nature of the action on the case, accord and satisfaction is provable under the general issue in case, but not in trespass.¹³⁷

1391 Accord and satisfaction, plea

That before the commencement of this suit, to wit, on, etc., at the city of, to wit, at the county of aforesaid, he, the said defendant, paid to the said plaintiff the sum of dollars of lawful money of the United States of America, for and in full satisfaction and discharge of the said grievances in the said declaration mentioned, and which said sum of dollars he, the said plaintiff, then and there accepted and received of and from him, the said defendant, in full satisfaction and discharge of the said grievances; and this the said defendant is ready to verify. Wherefore, etc.

1392 Arrest without warrant, public officer

An arrest without a warrant is legal if it is authorized by statute and it is necessary to the proper enforcement of the statute.¹³⁸ An individual, such as a conductor, who is given temporary power of arrest during a limited period and under certain circumstances is not a public officer under the constitution.¹³⁹

1393 Conspiracy between contractor and improvement board

In an action for conspiracy between a contractor and an improvement board it is no defense that the plaintiff could have

¹³⁷ Wallner v. Chicago Consolidated Traction Co., 245 Ill. 148, 151 (1910).

¹³⁸ Tarantina v. Louisville & Nashville R. Co., 254 Ill. 624, 631 (1912); Laws 1911, p. 462.

¹³⁹ Tarantina v. Louisville & Nashville R. Co., *supra*; Secs. 24, 25, art. 5, Constitution.

prevented the damages caused by the conspiracy, by injunction, *mandamus* or objections to the application for judgment and order of sale.¹⁴⁰

1394 Foreign laws and decisions, pleading

In an action on the case brought to recover for an injury sustained in another state, the defendant may prove, under the general issue, that he is not liable under the law and the decisions of that state, although, as a general rule, a foreign law must be specially pleaded.¹⁴¹

1395 Fraud and deceit; inquiry, failure to make

It is no defense to an action for deceit that the plaintiff confided in the false representations instead of making diligent inquiry, unless he has failed to exercise ordinary care and circumspection under the particular circumstances.¹⁴²

1396 Fraud and deceit; statute of frauds, general issue

In an action on the case for fraud and deceit the defense that the transaction constituting the cause of action is within the statute of frauds may be raised under the general issue.¹⁴³

1397 Intoxication, death unforeseen

In an action for unlawful intoxication, it is no defense to the action that the death of the intoxicated person could not have been foreseen by the defendant.¹⁴⁴

1398 Intoxication, life insurance

The collection of insurance money on the life of a husband who has been killed as a result of the unlawful sale of intoxicants, is no defense to an action for damages on account of such sale and killing.¹⁴⁵

¹⁴⁰ *Gage v. Springer*, 211 Ill. 200, 208 (1904).

¹⁴¹ *Christiansen v. Graver Tank Works*, 223 Ill. 142, 151 (1906).

¹⁴² *Weatherford v. Fishback*, 3 Scam. 170, 174 (1841).

¹⁴³ *Third National Bank v. Steel*, 129 Mich. 434, 438 (1902).

¹⁴⁴ *Eddy v. Courtright*, 91 Mich. 264, 268 (1892).

¹⁴⁵ *Deel v. Heiligenstein*, 244 Ill. 239, 241, 242 (1910).

1399 Intoxication; regulation and prohibition, scope

Under its police power, the state may regulate the use and sale of intoxicating liquors, even to the extent of entire prohibition, and for the purpose of reducing the evils of intemperance, it may regulate the times, places and circumstances of drinking intoxicating liquors.¹⁴⁶

LIBEL

1400 Demurrer

(Precede this in Illinois by general demurrer) And for special cause of demurrer as to the count of the said declaration, defendant saith that the same is not sufficient in law, because the said count of said declaration alleges that the alleged libelous matter is contained in an answer of defendant filed in a certain chancery proceeding in the court of county, and that the same is irrelevant, impertinent and unnecessary to the defense of said cause and does not set out and show to the court the pleadings in said cause so that the court can determine whether or not the said alleged libelous matter is irrelevant, impertinent and unnecessary to the defense of said cause; and this the said defendant is ready to verify; wherefore, etc.

1401 Denial or justification, proof

In actions for libel a defendant may deny the publishing of the words set out in the declaration or he may rely upon the truth of the words published.¹⁴⁷ Failure to prove a plea or notice of justification in an action for libel is of itself no evidence of malice or an aggravation for damages.¹⁴⁸

1402 General issue, scope

Under a denial or general issue in an action for libel the defendant may mitigate damages either by showing the general bad character of the plaintiff or by proving any facts which tend to disprove malice. A defendant under such an issue, has no right to prove specific acts or misconduct on the part of the plaintiff, but is confined to proof of his general bad character.¹⁴⁹

¹⁴⁶ *Tarantina v. Louisville & Nashville R. Co.* 254 Ill. 630; *Laws* 1911, p. 462.

¹⁴⁷ *Dowie v. Priddle*, 216 Ill. 553, 555 (1905).

¹⁴⁸ (10415), C. L. 1897; *Wheaton*

v. Beecher, 79 Mich. 443, 448 (1890); Sec. 3, c. 126, *Hurd's Stat.* 1909.

¹⁴⁹ *Dowie v. Priddle*, 216 Ill. 555, 557.

In an action based upon the falsity of a privileged communication, the defendant may show, under the general issue, the truth of such a communication. But when the action is for a libel which is not privileged, the justification of the libel is strictly in avoidance and must be pleaded or noticed specially. This is so because in the one case, the plaintiff is bound to prove, as a part of his cause of action, the falsity of the privileged communication, whereas in the other case, the falsity of the libel is not an issue unless the defendant puts it in issue by pleading.¹⁵⁰

1403 Justification; plea, requisites

A plea of justification in Illinois requires great certainty and particularity of averment. The justification must be of the very charge it is attempted to justify. When a charge is specific the plea need only allege that the charge is true; but where a charge is general, the plea must state the facts which show the charge to be true. It is not permissible to set up a charge of the same general nature, but distinct as to the particular subject. The plea must justify the very words contained in the declaration, or at least those that are actionable.¹⁵¹

1404 Justification; notice, requisites

A general notice of justification is good under modern Michigan practice; and by such a notice the defendant assumes to prove the truth of the libelist's statements precisely as charged. If a plaintiff is dissatisfied with a sweeping notice, the defendant may be compelled to serve particulars of his justification.¹⁵²

MALICIOUS PROSECUTION

1405 Attachment, waiver

The appearance of a defendant in an attachment proceeding which has been wrongfully brought against him, and the praying for a change of venue do not amount to a waiver of the trespass.¹⁵³

¹⁵⁰ *Edwards v. Chandler*, 14 Mich. 471, 475 (1866).

¹⁵¹ *Dowie v. Priddle*, 216 Ill. 556, 557.

¹⁵² *Bailey v. Kalamazoo Publishing Co.*, 40 Mich. 251, 254 (1879).

¹⁵³ *Thomas v. Hinsdale*, 78 Ill. 259, 261 (1875).

1406 False imprisonment, *res judicata*

An order of a circuit court holding to bail is a complete defense to an action for false imprisonment on a *capias*, in the absence of averment or proof of want of malice or probable cause.¹⁵⁴

1407 Justification; *res judicata*, plea, requisites

In an action for false imprisonment, a private person can only justify an arrest made by him by showing that a crime has in fact been committed and that the person arrested is guilty of the crime. Probable cause of guilt will not excuse a private individual's making an arrest or causing an arrest without a warrant.¹⁵⁵ A plea justifying an arrest of the plaintiff upon the ground that there was probable cause for having suspected the plaintiff of the commission of a felony and for having accused him thereof, must state the specific reasons why the plaintiff was suspected.¹⁵⁶ To a declaration counting solely upon an arrest and imprisonment without authority of law, a judgment and a process of a court is a complete defense, but not so in a case where the charge is based upon malice in issuing the process.¹⁵⁷

1408 Justification; *res judicata*, plea (Ill.)

(Commence and conclude as in Sections 887 and 892) That on, to wit, the day of was then, and is now, a justice of the peace in and for the said county of and state of Illinois, and that on the said day of, at the county and state aforesaid, the said defendant made oath before said that the said plaintiff did on the day of, 19.., commit a criminal offense, to wit, that the said plaintiff did feloniously and falsely make, forge and counterfeit a certain promissory note, purporting to be the promissory note of said to for the payment of dollars, with intent to injure and defraud the said defendant; and the said defendant avers that he, said defendant, had just and reasonable grounds to suspect and believe that said plaintiff had committed the crime of forg-

¹⁵⁴ Johnson v. Morton, 94 Mich. 1, 6 (1892).

¹⁵⁵ Enright v. Gibson, 219 Ill. 554 (1906).

¹⁵⁶ White v. McQueen, 96 Mich. 249, 253 (1893).

¹⁵⁷ Feld v. Loftis, 240 Ill. 105, 107, 108 (1909).

ery, as above mentioned; whereupon the said did on said day of, 19.., issue a warrant in the name of the people of the state of Illinois, and directed the same to all sheriffs, coroners and constables of said state of Illinois, commanding them, by the authority of said people of the state of Illinois, to arrest the said plaintiff, and bring him forthwith before the said or some other justice of the peace of said county, to answer said complaint of said of the crime of forgery aforesaid, which said warrant was then and there delivered to, the then acting sheriff of said county, and the said sheriff did, on, to wit, the day of, 19.., execute said writ by arresting the said plaintiff, and bringing him before said justice of the peace; whereupon said justice of the peace, after associating with him..... one of the justices of the peace of said county, proceeded to the trial of said plaintiff on said criminal charge, and the said plaintiff was, on said day of, 19.., before the justices aforesaid, tried and held to bail in the sum of dollars, to appear at the term 19.., of the court of county and in default of giving said bail, he, the plaintiff, was then and there committed to the jail of said county of; and the said defendant avers that afterwards, to wit, at the term,, 19.., the grand jury of said county of preferred an indictment against the said plaintiff, for making, forging and counterfeiting a certain promissory note, being the same note described in the oath before mentioned in this plea, and that said plaintiff was, at the term 19.., tried in this court for the crime of forgery, and found guilty of the same, and sentenced to the state's prison for the term of year.., and on motion then and there made by the plaintiff for a new trial, which the court then and there refused; which are the several supposed trespasses in the said declaration mentioned. Wherefore, etc.¹⁵⁸

1409 Probable cause, law and fact

Whether there was probable cause for the commission or omission of the act complained of, is a question of law when there is no dispute of the facts.¹⁵⁹

1410 Probable cause, pleading, proof

The existence of probable cause for an arrest of the plaintiff on the ground that he was guilty of the commission of felony

¹⁵⁸ Blalock v. Randall, 76 Ill. 224, 225, 227 (1875).

¹⁵⁹ White v. McQueen, 96 Mich. 249, 254 (1893).

cannot be shown under a plea of not guilty in an action for false imprisonment, but must be pleaded specially, or notice of it should be given under the general issue,¹⁶⁰ unless the declaration sets out fully the affidavit, warrant and records of the suit which is claimed to be malicious; in which case the general issue covers the defense of probable cause.¹⁶¹ A conviction by a competent tribunal having jurisdiction is *prima facie* evidence of the existence of probable cause for the prosecution, although subsequently reversed by a reviewing court, and it is a sufficient defense to a suit for malicious prosecution unless overcome by evidence that the conviction was obtained by false testimony, fraud, corrupt practices or unlawful or unjustifiable means on the part of the one procuring the conviction.¹⁶²

1411 Ordinance, pleading

In an action on the case, an ordinance or statute may be shown under the general issue.¹⁶³

1412 Ownership of property, denial; plea (Ill.)

(Commence and conclude as in Sections 887 and 891) That at the time of the committing of the alleged grievances in said declaration mentioned, on, to wit,, 19.., the plaintiff was not then, nor theretofore, nor before the time of the committing of the alleged grievances charged in said declaration, the owner in fee and lawfully entitled to the possession of the land described in said declaration, to wit: (Insert description) as charged in the plaintiff's said declaration herein.

(Maryland) Plea

The defendant in the above entitled case for a plea says:

That the plaintiff was not seized and had no right of possession of the land on which he alleges the damages occurred, which are declared on in this case.

¹⁶⁰ White v. McQueen, 96 Mich. 253.

¹⁶¹ Steadman v. Keets, 129 Mich. 669, 670 (1902); Birdsall v. Smith, 158 Mich. 390, 394 (1909).

¹⁶² McElroy v. Catholic Press Co., 254 Ill. 290, 297 (1912).

¹⁶³ Flynn v. Chicago City Ry. Co., 250 Ill. 460, 463 (1911).

Replication

The plaintiff for replication to the defendant's plea says that he is seized and has a right of possession to the land on which the alleged damage occurred declared on in this case.

1413 Release, pleading

A release, a former recovery, a satisfaction, or any other matter *ex post facto* which is in discharge of the cause of action is provable under the general issue in an action on the case without a plea of *puis darrein continuance*.¹⁶⁴

1414 Seduction, chastity

The defendant's reputation for chastity and purity of life, is no defense to an action for seduction.¹⁶⁵ Prior unchastity is a partial defense to an action for seduction, but not subsequent.¹⁶⁶

SLANDER

1415 Generally

The defenses to an action of slander are the same as to actions for libel.¹⁶⁷

1416 General issue, proof

In an action for slander, the defendant may show under the general issue, any facts and circumstances tending to prove that he believed the truth of the charge when uttered, for the sole purpose of rebutting or disproving malice and mitigating damages. But where the entire truth of the slanderous words is sought to be relied upon as a justification thereof, it must be specially pleaded or noticed.¹⁶⁸

1417 Justification; plea or notice, nature

A plea of justification is a new publication of the defamation when it is filed without an honest belief that it can be sustained.¹⁶⁹ But a plea or notice of justification is not conclusive

¹⁶⁴ *Chicago v. Babcock*, 143 Ill. 358, 364 (1892).

¹⁶⁵ *Watson v. Watson*, 53 Mich. 168, 177 (1884).

¹⁶⁶ *Stoudt v. Shepherd*, 73 Mich. 598.

¹⁶⁷ *Dowie v. Priddle*, 216 Ill. 555.

¹⁶⁸ *Huson v. Dale*, 19 Mich. 17, 34 (1869).

¹⁶⁹ *Freeman v. Tinsley*, 50 Ill. 497, 499 (1869).

evidence of malice nor an aggravation of damages, if not proven, as it was at common law.¹⁷⁰

1418 Justification; burden of proof, practice

Notwithstanding the filing of a plea of justification in an action for slander, the plaintiff must first prove the speaking of the words alleged, before the defendant is bound to make his defense under his plea.¹⁷¹

1419 Justification; plea, requisites

In an action for slander a plea of justification must be co-extensive with the slander, and need not go farther.¹⁷²

1420 Justification; notice, sufficiency

The sufficiency of a notice of justification in an action for slander is tested in Michigan by the same rules as a notice in any other action, since the statute of 1846.¹⁷³

1421 Statute of limitations, pleading

A plea of not guilty of the wrongful act within the period fixed by the statute of limitations is not good, if the original wrong is not of itself actionable without special damage; for the reason that the action in such a case is not for the wrongful act but solely for its consequences. A plea of not guilty is good if the original wrong is of itself actionable, and the action is brought solely for the wrongful act, for the plea is then a complete answer to the declaration.¹⁷⁴

1422 Statute of limitations, plea (D. C.)

And for further plea to the plaintiff's declaration this defendant says that the cause of action in said declaration mentioned did not accrue within years next before the filing of the above entitled suit.

¹⁷⁰ (10415), C. L. 1897; Sec. 3, c. 126, Hurd's Stat. 1909; *Huson v. Dale*, 19 Mich. 30; *Hawver v. Hawver*, 78 Ill. 413.

¹⁷¹ *Farnan v. Childs*, 66 Ill. 544, 547 (1873).

¹⁷² *Sanford v. Gaddis*, 13 Ill. 340 (1851).

¹⁷³ *Cresinger v. Reed*, 25 Mich. 450, 455 (1872).

¹⁷⁴ *McConnel v. Kibbe*, 33 Ill. 175, 179, 180 (1864).

(Illinois) *Plea*

(Commence and conclude as in Sections 887 and 892) That the said supposed cause of action in the said additional count in the said declaration mentioned filed, did not accrue to the plaintiff at any time within five years next before the commencement of this suit in manner and form as the plaintiff has above complained against it.

Replication

(Commence and conclude as in Section 928) That the said cause of action in the said additional count in the said declaration did accrue to him within four years next before the commencement of this suit in manner and form as he has above complained against the defendant.

GENERAL ISSUE**1423 Nature and effect**

A plea of general issue (not guilty) puts in issue all of the material averments in the declaration and admits the sufficiency of the respective counts to which the plea is interposed.¹⁷⁵ The defense of no cause of action or that the defendant is not liable is good under the general issue in an action on the case.¹⁷⁶

1424 Forms (D. C.)

The defendant for a plea to the plaintiff's declaration and to each count thereof says that it is not guilty as alleged.

(Florida)

Now comes the defendant by, its attorney, and for a plea says, that it is not guilty.

(Illinois)

And the said C D, defendant in this suit, by, its attorney, comes and defends the wrong and injury, when, etc., and says that it is not guilty of the said supposed trespasses above laid to its charge, or any part thereof, in manner and form as the said plaintiff hath above thereof complained against it; and of this it, the said defendant, puts itself upon the country.

¹⁷⁵ Chicago & Northwestern Ry. Co. v. Goebel, 119 Ill. 515, 521 (1887); Wenona Coal Co. v. Holmquist, 152 Ill. 581, 591, (1894); Louisville, N. A. & C. Ry. Co. v. Red, 154 Ill. 95, 96 (1894).

¹⁷⁶ Denver Township v. White River Log & Booming Co., 51 Mich. 472 (1883).

(Maryland)

The defendant, by, his attorney, for plea to the plaintiff's declaration in the above case filed, says that he did not commit the wrongs alleged.

(Mississippi)

Comes the defendant,, by his attorney, and for plea says that he is not guilty in manner and form set forth in plaintiff's declaration herein; and of this he puts himself upon the country.

(West Virginia)

And the defendant for plea in this behalf says that he is not guilty of the grievances above laid to his charge in the manner and form as the plaintiff hath above thereof complained against him; and of this he puts himself upon the country.

VERDICT

1425 Florida

We, the jury, find for plaintiff and assess his damages at dollars.

So say we all.

., Foreman.

1426 Illinois, dram-shop

In an action brought under the Dram-Shop act against a saloonkeeper and the owner of the premises jointly, the form of verdict is correct if against both.¹⁷⁷

1427 Illinois, general*Plaintiff*

We, the jury, find the defendants guilty as alleged in the declaration, and we assess the plaintiff's damages at the sum of dollars.

Defendant

We, the jury, find the defendants not guilty.

Verdict for one and against another:

We, the jury, find the defendant,, guilty as alleged in the declaration, and we assess the plaintiff's damages at the sum of dollars; and we the jury find the defendant,, not guilty.

¹⁷⁷ *Triggs v. McIntyre*, 215 Ill. 369, 376 (1905).

1428 Mississippi

We, the jury, find for the plaintiff and assess the damages at dollars.

We, the jury, find for the defendant,

1429 Virginia

We, the jury, on issue joined, find for the plaintiff, and we assess his damages at dollars.

1430 West Virginia

We, the jury, upon the issue joined find for the defendant.
....., Foreman.

JUDGMENT**1431 Requisites**

In an action for the unlawful sale of intoxicating liquors, the judgment should not attempt to distribute the amount recovered; but if such a distribution is made, it will be regarded as surplussage.¹⁷⁸ A judgment against sureties on a saloonkeeper's bond should be limited to the penalty of the bond.¹⁷⁹

1432 Form (Miss.)

(For commencement and conclusion see Chapter XCV) It is therefore considered by the court that the plaintiffs,, recover of and from the defendants the mayor and boards of aldermen and councilmen of the city of, a municipal corporation, the sum of dollars and all costs of suit: for all of which let execution issue.

1433 Appeal

A plaintiff is not required to appeal from a judgment rendered in favor of a co-defendant to an action for a several tort.¹⁸⁰

¹⁷⁸ *Helmuth v. Bell*, 150 Ill. 263, 269 (1894).

¹⁷⁹ *Merrinane v. Miller*, 157 Mich. 279, 285 (1909).

¹⁸⁰ *Schmidt v. Chicago City Ry. Co.*, 239 Ill. 494, 499 (1909).

CHAPTER XXIII

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CAUSES OF ACTION GENERALLY

1434 Cause of action defined

In personal injuries, the cause of action is the act or thing done or omitted to be done of the defendant towards the plaintiff which causes the grievance for which the law gives a remedy.¹ The gist of the action is the defendant's negligence.²

1435 Accident

No action is maintainable for a personal injury which is the result of pure or unavoidable accident. Ordinarily, an occur-

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¹ Swift Co. v. Gaylord, 229 Ill. 330, 334 (1907); South Chicago City Ry. Co. v. Kinnare, 216 Ill. 451, 452 (1905); Lee v. Republic

Iron & Steel Co., 241 Ill. 372, 378 (1909).

² Pennsylvania Co. v. Conlan, 101 Ill. 93, 103 (1881).

rence is designated as purely accidental when its real cause cannot be traced or the cause is not apparent.³ Where there is negligence, there is no unavoidable accident and the person or corporation who is guilty of negligence is liable.⁴ A party may recover for an injury which is the result of another's negligence as an efficient cause combining with inevitable accident or inanimate thing, while the injured or deceased party was in the exercise of ordinary care for his own safety.⁵

NEGLIGENCE

1436 Actionable negligence, law and fact

Actionable negligence is based upon the want of ordinary care and skill toward a person to whom the defendant owes a legal duty in that regard and an injury results from a breach of that duty, and none other.⁶ In Illinois, there are no degrees in actionable negligence.⁷

1437 Cause, proximate; test

No cause of action exists for a violation of a duty which is not the proximate cause of the injury.⁸ A negligent act is the proximate cause of an injury, if the consequences follow in unbroken sequence from the wrong to the injury, without any efficient cause intervening, and if, by the exercise of ordinary care at the time of the negligence, the wrongdoer might have foreseen that some injury might result from the negligence, although the particular injurious consequences and the precise manner of their infliction could not reasonably have been foreseen.⁹ The nearest independent cause which is adequate to produce and does bring about an injury is its proximate cause and supersedes any remote cause.¹⁰

³ Chicago & Eastern Illinois R. Co. v. Reilly, 212 Ill. 506, 511 (1904); Lewis v. Flint & Pere Marquette Ry. Co., 54 Mich. 55 (1884).

⁴ Flanagan v. Chicago City Ry. Co., 243 Ill. 456, 460 (1910).

⁵ Commonwealth Electric Co. v. Rose, 214 Ill. 545, 554 (1905); Illinois Central R. Co. v. Siler, 229 Ill. 390, 397 (1907); Yarber v. Chicago & Alton Ry. Co., 235 Ill. 589 (1908).

⁶ Gibson v. Leonard, 143 Ill. 182, 189, 193 (1892).

⁷ Chicago, Rock Island & Pacific Ry. Co. v. Hamler, 215 Ill. 525, 532, 541 (1905).

⁸ Cook v. Big Muddy-Carterville Mining Co., 249 Ill. 41, 50 (1911).

⁹ Heiting v. Chicago, Rock Island & Pacific Ry. Co., 252 Ill. 466, 474 (1911); Seith v. Commonwealth Electric Co., 241 Ill. 252, 259 (1909); Illinois Central R. Co. v. Siler, 229 Ill. 390, 394 (1907).

¹⁰ Yeates v. Illinois Central R. Co., 241 Ill. 205, 211 (1909).

1438 Cause, proximate; law and fact, practice

The question of proximate cause of an injury is ordinarily a question of fact, to be determined by the jury from a consideration of all the attending circumstances. It might, however, arise as a question of law or pleading when the facts are not disputed or they are such that there can be no difference in the judgment of reasonable men as to the inferences to be drawn from them.¹¹ The proximate cause of an injury is a question of fact where the evidence is conflicting.¹² When the proximate cause is a question of fact, it should be submitted to the jury under proper instructions.¹³

1439 Concurrent causes; parties

For an injury produced by two causes acting at the same time, the party who, himself or by his agent or representative, puts in motion the essential or proximate cause of injury is liable for the same.¹⁴ Either or both parties may be held responsible for the consequences resulting from their combined negligence when it constitutes the proximate cause of the injury.¹⁵

1440 Contributing negligence, law and fact

Contributory negligence that is the proximate cause of an injury will defeat a recovery.¹⁶ A person who exercises a degree of care that is required of a reasonably prudent person under the same circumstances is not guilty of contributory negligence.¹⁷ The negligence of a companion or driver will not excuse a party's own negligence in not taking proper precaution to avoid injury.¹⁸ Whether a person has exercised the necessary degree of care that is required of him must be determined from a consideration of all of the circumstances leading up to

¹¹ *Illinois Central R. Co. v. Siler*, 229 Ill. 393; *Nall v. Taylor*, 247 Ill. 580, 585 (1910); *Heiting v. Chicago, R. I. & P. Ry. Co.*, 252 Ill. 472.

¹² *Washcow v. Kelly Coal Co.*, 245 Ill. 516, 520 (1910).

¹³ *Chicago & Alton R. Co. v. Harrington*, 192 Ill. 91, 36 (1901).

¹⁴ *Washcow v. Kelly Coal Co.*, 245 Ill. 520; *Chicago & Eastern Illinois R. Co. v. Kimmel*, 221 Ill. 547, 550

(1906); *Seigel, Cooper & Co. v. Trocka*, 218 Ill. 559, 562 (1905).

¹⁵ *Chicago & Alton R. Co. v. Harrington*, 192 Ill. 9, 29 (1901).

¹⁶ *Flynn v. Chicago City Ry. Co.*, 250 Ill. 460, 464 (1911).

¹⁷ *Rosenthal v. Chicago & Alton R. Co.*, 255 Ill. 552, 556 (1912).

¹⁸ *Flynn v. Chicago City Ry. Co.*, 250 Ill. 464.

the occurrence or accident; and where the evidence is conflicting, the question of negligence is for the jury.¹⁹

1441 Due care, law and fact

Due care and caution means the reasonable and prudent exercise of care by a person for his own safety and to avoid injury, the exercise of which depends upon all of the conditions and circumstances that surround the person at the time he is called upon to act. Age, defective vision or hearing, or other infirmity, are conditions to be considered in determining whether due care and caution have been used.²⁰ A deaf or blind person is bound to exercise a greater degree of care for his own safety than should one who is not thus affected.²¹ A party is not absolved from the necessity to exercise such care as the law demands, by the presumption that every person will perform the duty enjoined by law or imposed by contract upon him and that the law does not impose a duty to anticipate negligence in others.²² Voluntary intoxication does not excuse a person from exercising such care as may reasonably be expected from one who is sober.²³ The exercise of due care is a question of fact for the determination of the jury under proper instructions.²⁴

1442 Damages, scope

A party may recover for personal injuries arising from negligence which has been aggravated by organic tendencies and the treatment of physicians.²⁵

1443 Negligence at common law, law and fact

The existence of common law negligence is a question of fact.²⁶ The commission or the omission of an act or a duty made actionable at common law constitutes common law negligence.

¹⁹ Rosenthal v. Chicago & Alton R. Co., 255 Ill. 557.

²⁰ Rosenthal v. Chicago & Alton R. Co., 255 Ill. 550, 560.

²¹ Toledo, Peoria & Western Ry. Co. v. Hammett, 220 Ill. 9, 14 (1906).

²² Schlauder v. Chicago & Southern Traction Co., 253 Ill. 154, 159 (1912).

²³ Keeshan v. Elgin, Aurora & Southern Traction Co., 229 Ill. 533, 537 (1907).

²⁴ Bonato v. Peabody Coal Co., 248 Ill. 422 (1911).

²⁵ Chicago City Ry. Co. v. Saxby, 213 Ill. 274, 281 (1904).

²⁶ Butler v. Aurora, Elgin & Chicago R. Co., 250 Ill. 47, 50 (1911).

1444 Statutory violations

Such persons only as are intended to be benefited or protected by a statute can rely upon its violation as giving them a cause of action.²⁷ A person who is injured as a result of a violation of an ordinance passed for the protection of members of his class may maintain an action against the person who is guilty of the violation and the injury.²⁸

RESPONDEAT SUPERIOR

1445 Doctrine

Every person who manages his affairs by an agent or a servant is answerable to third persons for damages which result from the agent's or servant's negligent performance of his work done in the course of his employment and within the scope of his authority.²⁹ An employer is responsible for his own, or his employee's failure to anticipate the results that naturally follow either's acts;³⁰ but not for those which cannot be foreseen and which the employer is under no moral obligation to notice.³¹ An injury which is the result of the fault of an employee or an agent, concurring with that of the employer, renders both liable.³² An employer is liable to third persons for the negligent conduct of his employee while acting within the line of his duty and in obedience to the employer's authority, independently of whether there is any liability of the employee to the employer.³³

1446 Gist of the action

In an injury resulting from the negligence of an employee, the employee's negligence is the gravamen of the charge, whether the action is against the employer severally or jointly with the employee; and if the employee is not negligent or is found not guilty, there can be no cause of action against the employer.³⁴

²⁷ *Gibson v. Leonard*, 143 Ill. 182, 196 (1892).

²⁸ *Conrad v. Springfield Consolidated Ry. Co.*, 240 Ill. 12, 16 (1909).

²⁹ *Harding v. St. Louis National Stock Yards*, 242 Ill. 444, 449 (1909).

³⁰ *Yeates v. Illinois Central R. Co.*, 241 Ill. 211.

³¹ *Pinkely v. Chicago & Eastern Illinois R. Co.*, 246 Ill. 370, 380 (1910).

³² *Kleinfelt v. Somers Coal Co.*, 156 Mich. 473, 479 (1909).

³³ *Star Brewing Co. v. Hauck*, 222 Ill. 348, 353 (1906).

³⁴ *Hayes v. Chicago Tel. Co.*, 218 Ill. 414, 418 (1905).

1447 Application of doctrine, charitable institutions

The doctrine of *respondeat superior* has no application unless the relation of employment exists.³⁵ The essential elements of an employment are the power of the employer to direct the employee with reference to what work he shall do and the manner in which that work should be performed, and the power to discharge and remove him.³⁶ A person who is a general employee of one party may be hired by his employer to another for some special service, so as to become, as to such service, the employee of the other, the test being whether, in the particular service, the employee continues to be under the direction and control of his general or special employer. Whether a person is in the employ of a general or special employer depends upon the circumstances in each case.³⁷ The rule or principle of *respondeat superior* has no application to public or private institutions organized for purely charitable purposes.³⁸

1448 Application of doctrine, municipalities

A municipality is not liable, under the doctrine of *respondeat superior* for the negligent acts of its agents or servants engaged in executing, enforcing or giving effect to its police ordinances and regulations.³⁹ This rule is based on the principle that the acts of the officers or agents of the municipality that are illegal and unlawful are *ultra vires* where a municipality is simply exercising its police power.⁴⁰ But a municipality is liable for the negligent acts of its officers or agents when it is given by statute private or proprietary rights for its benefit and profit, and an injury results through an exercise of these rights.⁴¹

PARTIES

1449 Aliens

An action for personal injuries may be brought for the benefit of a nonresident alien.⁴²

³⁵ *Harding v. St. Louis National Stock Yards*, 242 Ill. 451.

³⁶ *Yeates v. Illinois Central R. Co.*, 241 Ill. 212.

³⁷ *Harding v. St. Louis National Stock Yards*, 242 Ill. 449.

³⁸ *Parks v. Northwestern University*, 218 Ill. 381, 384 (1905).

³⁹ *Tollefson v. Ottawa*, 228 Ill. 134, 136 (1907); *Richmond v.*

Long's Admrs., 17 Gratt. 375 (Va. 1867).

⁴⁰ *Tollefson v. Ottawa*, 228 Ill. 134, 138 (1907).

⁴¹ *Chicago v. Selz, Schwab & Co.*, 202 Ill. 545 (1903); *Tollefson v. Ottawa*, 228 Ill. 137.

⁴² *Guianios v. De Camp Coal Mining Co.*, 242 Ill. 278, 283 (1909).

1450 Husband and wife

At common law the husband was required to join his wife in an action for injuries to her person or reputation.⁴³ In Illinois this rule has no application on account of the Married Woman's act of 1861. Under this act the wife alone must sue for injuries sustained by her.⁴⁴ So, in Michigan the wife, and not the husband, must sue for personal injuries to her.⁴⁵

1451 Joint wrongdoers, master and servant

A person is not relieved from liability for his negligent act by the mere fact that another's negligent act contributed to the injury.⁴⁶ Each wrongdoer is responsible for the whole amount of damages, without apportionment.⁴⁷ The employer and an employee may be joined in an action for personal injuries when the latter has acted in the capacity of vice-principal and the injury is the result of the violation of a common duty resting upon both.⁴⁸

1452 Lessor and lessee

The negligent operation of a railway renders the lessor and the lessee liable for the resultant injury, whether the lessor is guilty of actual negligence or not.⁴⁹

MASTER AND SERVANT

1453 Liability, scope

An employer is responsible for the negligent performance of his personal and positive duties to his employees when the duties are performed by himself or by any of his employees and the injury would not have occurred but for such negligence. An employee, of whatever rank or authority who is authorized by his employer to perform his personal duties is

⁴³ Chicago v. Speer, 66 Ill. 154, 156 (1872).

⁴⁴ Chicago v. Speer, *supra*; Hawver v. Hawver, 78 Ill. 412, 414 (1875).

⁴⁵ Roberts v. Detroit, 102 Mich. 64, 67 (1894).

⁴⁶ Flanagan v. Wells Bros. Co., 237 Ill. 82, 87 (1908).

⁴⁷ Devaney v. Otis Elevator Co., 251 Ill. 28, 39 (1911).

⁴⁸ Republic Iron & Steel Co. v. Lee, 227 Ill. 246, 254 (1907).

⁴⁹ Chicago & Eastern Illinois R. Co. v. Schmitz, 211 Ill. 416, 458 (1904); Chicago & Western Indiana R. Co. v. Newell, 212 Ill. 332, 335 (1904).

a vice-principal.⁵⁰ The personal duties of the employer are: the duty to provide reasonably safe machinery and appliances; the duty to furnish a reasonably safe place in which to work; the duty to provide for inspection and repair of premises and appliances; and the duty to inform immature, ignorant or unskilled employees of the dangers of the employment.⁵¹

1454 Appliance and machinery

An employer is liable for an injury resulting from defective appliance or machinery when he has failed to exercise reasonable and ordinary care and diligence in the selection and supplying of the appliance or machinery causing the injury.⁵² A person who assumes to furnish employees of an independent contractor implements or instrumentalities to do the work, is required to provide reasonably safe and suitable implements; and such person renders himself liable to such employees in damages for a failure to perform this duty if it results in injury to them.⁵³ The employee is required to notice all patent and obvious defects which the exercise of ordinary care for his own safety would discover.⁵⁴ A party is not liable for an injury resulting from a latent defect in the material employed in the construction of machinery, when the machinery was constructed of proper material, free from defects, when the known, usual, and well recognized tests were used in selecting the machinery, and when experienced, skilful and prudent servants were employed to use it.⁵⁵

1455 Safe place

It is the duty of an employer to use reasonable diligence to provide his employee with a reasonably safe place in which to work, and to use reasonable care to maintain the safety of the place, except where, during the progress of the work and the workmen engaged in it, the conditions are changing from time to time; making it impractical to do so, or where it is the duty

⁵⁰ *Baier v. Selke*, 211 Ill. 512, 517 (1904); *Chicago Union Traction Co. v. Sawusch*, 218 Ill. 130, 136 (1905); *Odin Coal Co. v. Tadlock*, 216 Ill. 624, 628 (1905).

⁵¹ *Baier v. Selke*, *supra*; *Mobile & Ohio R. Co. v. Godfrey*, 155 Ill. 78 (1895); *Schillinger Bros. Co. v. Smith*, 225 Ill. 74, 79 (1907).

⁵² *Orr v. Waterson*, 228 Ill. 138, 141 (1907); *Green v. Sansom*, 41 Fla. 94, 103 (1909).

⁵³ *Green v. Sansom*, *supra*.

⁵⁴ *Green v. Sansom*, *supra*.

⁵⁵ *Illinois Central R. Co. v. Phillips*, 49 Ill. 234, 237 (1868); *Toledo, Wabash & Western Ry. Co. v. Beggs*, 85 Ill. 80, 83 (1877).

of the employee to make dangerous places safe. This duty is a continuing one and cannot be delegated to another so as to relieve the employer from liability for injuries resulting from its negligent performance.⁵⁶

1456 Warning of danger

The employer owes a duty to an employee to warn him of any peculiar and unusual dangers which might be encountered in the performance of the employer's work and to warn the employee of latent and hidden dangers which the employer has reason to anticipate when the dangers are of such a nature that the employee, from lack of knowledge may not appreciate or understand them by an ordinary inspection, although he might be a man of average intelligence.⁵⁷ The duty of an employer to warn an employee before he is exposed to the risk of a dangerous substance used in his employment arises when the substance is liable to injure a person who might handle it, when the employer knows, or by the exercise of ordinary diligence might know that the substance is dangerous and capable of producing injury, and when the employee does not know that the substance is dangerous and likely to injure him, and he has no equal opportunity with his employer of knowing thereof at the time of the injury.⁵⁸ An employer is not liable for an injury to an employee when it is the result of a failure to warn him of dangers which are patent to ordinary intelligence.⁵⁹

1457 Rules and customs

An employer who conducts a business with different branches owes a duty to his employees to make, publish and enforce reasonable rules and regulations for the promotion of their safety; but the failure to perform the duty will not excuse the employer from recognizing an employee's custom having the effect of promoting such safety.⁶⁰

⁵⁶ *Montgomery (Village) v. Robertson*, 229 Ill. 466, 472 (1907); *Kelleyville Coal Co. v. Bruzas*, 223 Ill. 595, 601 (1906); *Illinois Steel Co. v. Ziemkowski*, 220 Ill. 324, 331 (1906).

⁵⁷ *Postal Telegraph-Cable Co. v. Likes*, 225 Ill. 249, 260 (1907).

⁵⁸ *Pinkley v. Chicago & Eastern*

Illinois R. Co., 246 Ill. 370, 377 (1910).

⁵⁹ *Montgomery (Village) v. Robertson*, 229 Ill. 471.

⁶⁰ *Yeates v. Illinois Central R. Co.*, 241 Ill. 210; *St. Louis National Stock Yards v. Godfrey*, 198 Ill. 288, 294, 295 (1902).

1458 Foreman's negligence

When the injury is the result of a foreman's negligent performance of his duties as foreman, the employer is liable, but not when it is the result of and act as a fellow-servant.⁶¹

1459 Concurrent negligence, fellow-servant, law and fact

The employer is responsible for the negligence of fellow-servants concurring with his negligence which constitutes the proximate cause of the injury.⁶² Whether servants of a common employer are fellow-servants, is a question of fact to be determined from all of the circumstances in each case, unless the facts are conceded or there is no dispute with reference thereto, and all reasonable men will agree, from the evidence and the legitimate conclusions to be drawn therefrom, of the existence of the relation.⁶³ The cager and engineer operating cars in a coal mine are not necessarily fellow-servants.⁶⁴

1460 Rest period

An employer is liable for an employee's negligence during his rest period, if the act which has resulted in injury is within the scope of his duties.⁶⁵

1461 Municipality; notice, necessity

The statutory notice to a municipality of a claim for personal injuries must be given before and not after suit has been commenced. The giving of the notice is one of the essential elements of a good cause of action against a municipality and must exist at the time of the commencement of the action against it.⁶⁶ The statutory requirement of notice to a municipality in cases of personal injuries extends to municipal employees and is valid.⁶⁷

⁶¹ Baier v. Selke, 211 Ill. 516.

⁶² Yeates v. Illinois Central R. Co., 241 Ill. 213; Sturm v. Consolidated Coal Co., 248 Ill. 20, 31 (1910).

⁶³ and ⁶⁴ Sturm v. Consolidated Coal Co., 248 Ill. 28.

⁶⁵ Tijan v. Illinois Steel Co., 250 Ill. 554, 559, 560 (1911).

⁶⁶ Langguth v. Glencoe, 253 Ill. 505, 507, 509 (1912); Pars. 6 and 7, c. 70, Hurd's Stat. 1909, p. 1247.

⁶⁷ Condon v. Chicago, 249 Ill. 596, 599, 600 (1911); Sec. 2, Laws 1905, p. 111 (Hurd's Stat. 1909, p. 1248).

1462 Municipality, notice, requisites

The notice required by statute to be given to a municipality must state the exact date and hour of the injury or accident.⁶⁸

1463 Municipality, notice, from (Mich.)

State of Michigan, }
 county, } ss.
 village. }

To the clerk of the village of, as aforesaid.

Please take notice that I intend to hold the said village of liable for the damages sustained by me by reason of injuries to my person caused by the negligence of said village as set forth substantially in the statement herewith presented, under the provisions section 2775 of the Compiled Laws of 1897 of the state of Michigan as amended, therein also setting forth substantially the time when and the place where such injury took place, the manner in which it occurred, and the extent of such injury, so far as known, the amount of damage for such negligence, and injury, to be hereafter filed with the common council of said village in accordance with the provisions of section 2754 of the Compiled Laws of 1897, state of Michigan.

Dated this day of, 19...

Respectfully submitted,

.....
 Claimant.

Statement

In accordance with the above notice, the said of the village of aforesaid, hereby presents to the council of said village her statement showing the time, place, manner, and extent of her injuries as far as known, as follows:

That on the day of, 19..., she, the said in company with others, was walking westward upon the public sidewalks of said village, to wit, the sidewalk abutting upon and situated on the south side of lot owned by, on the northwest corner of and streets, in said village, and it then and there and previously became and was the duty of said village to have said walk reasonably safe and convenient for public travel, and the said sidewalk was under the care and control of the said village and the same was open to public travel; that said sidewalk was unsafe for public travel; that said village had knowledge that the said sidewalk was not reasonably safe for public travel, and had previously served notice upon the owner of the premises abutting upon said walk to rebuild the same; that the said village had sufficient notice

⁶⁸ Onimette v. Chicago, 242 Ill. 501, 507 (1909); Condon v. Chicago, 249 Ill. 602.

that the said sidewalk had not been rebuilt, but had negligently failed to cause the same to be repaired or rebuilt, so that the sidewalk would be reasonably safe for pedestrians and for public travel after said village had had reasonable opportunity so to do; and because of such neglect the said, while walking along said sidewalk, in the darkness of the evening, to wit, about the hour of o'clock p. m., when within about feet from the west end of said sidewalk, and without carelessness or negligence upon her part was tripped by a loose plank, and thrown to the ground. And by reason thereof, and the negligence of said village as aforesaid in not constructing or repairing said sidewalk after notice that the same was not safe for public travel, and after having a reasonable opportunity so to do, the said then and there became and was greatly hurt, bruised, wounded, the ligaments of the right shoulder ruptured, causing this claimant to become sick, sore, lame, and disordered; and she will so continue for a long space of time.

And also because of said negligence the said has been compelled to pay and has incurred an indebtedness, and will be obliged to pay in the future large sums of money to defray the expense in the employment of a physician. And also because of the negligence aforesaid on the part of the said village the said has been since the said day of, 19.., and will for some time in the future be unable to perform her duties and resume her employment. And also, by reason of the negligence of the village as above said, the claimant, has suffered, and will continue to suffer, great bodily pain and anguish.

And your claimant,, further gives notice that, as soon as she is able to ascertain and determine the extent of her injuries by reason of the negligence of said village as aforesaid, she intends to file with said village council an itemized statement of her claim or account as provided by said section 2754 of the Compiled Laws of 1897.

Account

Village of

In account with Dr.

For damages and injuries sustained by reason of the negligence of the village as fully set forth in the notice of intention to hold said village liable for damages filed with the village clerk of the village of, aforesaid, on the day of, 19.., as follows:

.....	To loss of time from the.....	
	to the, being	
	weeks at \$. per week.....	\$.
.....	To board during said time at \$.	
	per week	\$.

.....	To doctor's bill and expense incurred therefor	\$.....
.....	To nursing and care during ... weeks of said period at \$..... per week	\$.....
.....	To mental anguish, pain and suffering by reason of the negligence of said village	\$.....
.....	To future damages, pain and suffering and loss of time by reason of the negligence of said village as aforesaid	\$.....
	Total	\$.....

State of Michigan, }
 county. } ss.

....., the above named claimant of the village of, in the said county, being duly sworn, deposes and says that the above account is true and correct; that the sums charged for the damages sustained and the loss incurred as above set forth are reasonable and just; that to the best of her knowledge no set-off exists nor payment made on account thereof; and that there is now due from said village to this deponent for the injuries sustained by reason of the negligence of said village as aforesaid, the sum of..... dollars.

Subscribed, etc.⁶⁹

.....

1464 Municipality, notice, service

The service of the notice required by Illinois statute may be had upon the village clerk if the action is to be brought against a village, by filing the same in his office, where the village has no regular licensed village attorney who maintains an office or place of business.⁷⁰ The particular mode of service of written notice or a statement of the injury required to be made by statute is not binding upon the injured party, unless it clearly appears that there was a licensed attorney duly appointed for the municipality who has an office at a fixed place, that the person who has been injured by the negligence of the municipality may know with reasonable certainty with whom and in what place to file the notice.⁷¹ Courts do not take judicial notice of offices created by ordinance, as the office of city attorney.⁷²

⁶⁹ Hawley v. Saranac (Village), (Village), 247 Ill. 522, 525, 526 157 Mich. 70 (1909); (2754), (1910); Sec. 2, Laws 1905, p. 111. (2775), C. L. 1897.

⁷² Condon v. Chicago, 249 Ill. 602.

⁷⁰ and ⁷¹ Donaldson v. Dieterich

1465 Next of kin

Parents, as next of kin, have a cause of action for injuring or killing a minor child, on the ground that they are entitled to the child's services until the child reaches majority.⁷³

1466 Principal and agent, nonfeasance and misfeasance

An agent is not always liable to third persons. For a mere nonfeasance or nonperformance of a duty, the agent is liable solely to his principal. For misfeasance or the improper performance of a duty, the agent is liable to third persons injured by such negligence.⁷⁴

1467 Public officials, agents and contractors

The public officers and agents are liable for their own personal negligence in the discharge of their duties, but they are exempt from liability for acts or defaults of inferior officials in the public service, whether appointed by them or not. A contractor with the government for the transportation of the mails is not engaged in a public service within the meaning of the foregoing rule and is liable to a mail clerk for an injury sustained by him in a collision caused by the contractor's servant's negligence.⁷⁵

1468 Railroad companies, unusual dangers, free pass

A common carrier of passengers is bound to exercise greater precaution toward a passenger who is in a dangerous position by its consent than it has in a case of a passenger who is not in that condition; and a passenger who is in an unusually dangerous position when traveling is required to use a greater degree of care for his own safety than he would otherwise be required to exercise.⁷⁶ A free ticket or pass which contains the usual conditions exempts the railroad company from liability for an injury to the person who travels upon the pass, except where the railroad company is guilty of gross or wilful negligence in operating its railroad trains.⁷⁷

⁷³ *Chicago & G. T. Ry. Co. v. Gaeiowski*, 155 Ill. 185, 191 (1895).

⁷⁴ *Consolidated Gas Co. v. Connor*, 114 Md. 140, 156 (1910).

⁷⁵ *Barker v. Chicago, P. & St. L. Ry. Co.*, 243 Ill. 482, 486 (1910).

⁷⁶ *Math v. Chicago City Ry. Co.*, 243 Ill. 114, 120, 121 (1909).

⁷⁷ *Toledo, Wabash & Western Ry. Co. v. Beggs*, 85 Ill. 80, 84 (1877).

1469 Trespassers and licensees

A railroad company owes a trespasser upon its right of way or a licensee no duty other than that to abstain from wantonly and recklessly injuring him, and is bound to use only reasonable care to avoid injuring him after he is discovered to be in a perilous situation.⁷⁸ So, the owner of land and buildings assumes no duty to one who is on his premises by permission alone as a mere licensee, whether under license from the owner or by law, except that the owner shall refrain from wilful or affirmative injurious acts.⁷⁹

JURISDICTION

1470 Injury and death in another state

No action can be maintained in Illinois for a wrongful act and death which have taken place in another state, whether the action be based upon the foreign or Illinois statute.⁸⁰

DECLARATION

1471 Joinder of causes of action, damages

By special statutory provision in Illinois, counts in trespass and counts in case may be joined in the same declaration or action.⁸¹ Injuries to the person and damages to his property may be joined in a single count, where the injuries and the damages result in the same manner and from the same negligent or unlawful act of the defendant, where they are coincident in time, and where the causes of action accrue to the plaintiff in the same right and against the defendant in the same character or capacity.⁸² A count based upon the Survival act and a count under the Death act may be joined in Michigan in one action because the right of action in both cases is vested in the personal representative of the estate and the remedy is of a nature requiring such joinder of counts.⁸³ In actions *ex delicto*

⁷⁸ Bartlett v. Wabash R. Co., 220 Ill. 163, 165 (1906); Thompson v. Cleveland, Cincinnati & St. Louis Ry. Co., 226 Ill. 542, 545 (1907); Blanchard v. Lake Shore & M. S. Ry. Co., 126 Ill. 416, 424 (1888).

⁷⁹ Gibson v. Leonard, 143 Ill. 182, 189 (1892); Casey v. Adams, 234 Ill. 350, 355, 356 (1908).

⁸⁰ Dougherty v. American McKenna Process Co., 255 Ill. 369, 370 (1912); Sec. 2, Injuries act

(Hurd's Stat. 1911, p. 1290); Sec. 1, art. 4, Federal constitution; Par. 1, sec. 2, art. 4, Federal constitution.

⁸¹ Krug v. Ward, 77 Ill. 603, 605 (1875); Barker v. Koozier, 80 Ill. 205, 206 (1875).

⁸² Chicago West Division Ry. Co. v. Ingraham, 131 Ill. 659, 665 (1890).

⁸³ Carbury v. Detroit United Ry., 157 Mich. 683, 684 (1909).

there may be a recovery against a single defendant under a declaration which charges joint negligence against several.⁸⁴

1472 Venue, demurrer

In an action against a railroad company for personal injuries, the declaration should aver that the railroad owned by defendant and used by it was used in the county and state in which the action is brought; the failure to so aver, however, can be taken advantage of only by demurrer.⁸⁵

1473 Character of defendant

An averment that the village of (naming it) a municipal corporation of the state of (naming it) is sufficient to show the corporate existence and character of the defendant.⁸⁶

1474 General requisites

Three elements are essential to the statement of a good cause of action for negligence, namely: the existence of a duty on the part of the person who is charged to protect the complaining party from the injury that was received; a failure to perform that duty; and an injury which has resulted from its nonperformance. The absence of any one of these elements renders the pleading bad.⁸⁷ In an action for personal injuries against more than one defendant, the statement of a cause of action must be complete, in itself, against each one of the defendants without the aid of allegations against the other.⁸⁸

1475 Duty, averment

Duties may be general and owing to everybody, or particular and owing to a single individual, by reason of his peculiar position. A general duty becomes personal and particular when

⁸⁴ *Linquist v. Hodges*, 248 Ill. 491, 495 (1911).

⁸⁵ *Chicago & Rock Island R. Co. v. Morris*, 26 Ill. 400, 402 (1861).

⁸⁶ *Clark v. North Muskegon*, 88 Mich. 308, 309 (1891).

⁸⁷ *Devaney v. Otis Elevator Co.*, 251 Ill. 28, 33 (1911); *Bahr v. National Safe Deposit Co.*, 234 Ill. 101, 103 (1908); *Chicago Union Traction Co. v. Giese*, 229 Ill. 260,

263 (1907); *Greinke v. Chicago City Ry. Co.*, 234 Ill. 564, 567 (1904); *Hackett v. Chicago City Ry. Co.*, 235 Ill. 116, 132 (1908); *East St. Louis Connecting Ry. Co. v. Meeker*, 229 Ill. 98, 106 (1907); *McAndrews v. Chicago, Lake Shore & E. Ry. Co.*, 222 Ill. 232, 236 (1906).

⁸⁸ *Klawiter v. Jones*, 219 Ill. 626, 629 (1906).

some person is placed in a position giving him special occasion to insist upon its performance.⁸⁹ The declaration must state facts from which the law will raise a duty, and it is not sufficient to allege that it is the duty of the defendant to do certain things, as that would be but the averment of a conclusion.⁹⁰ A duty will not be implied from the mere characterization of an act as negligent and reckless.⁹¹ If the declaration fails to state facts from which the law raises a duty owing from the defendant, it will be insufficient to support a judgment.⁹² A single count of the declaration may charge several distinct breaches of duty, and proof of any one of them will entitle the plaintiff to a recovery.⁹³

1476 Negligence; averment, proximate cause

A declaration for personal injuries must state the specific act or omission relied upon as constituting a breach of duty in order that a cause of action may appear therefrom.⁹⁴ The pleader is not required to set out the particular facts constituting the negligence complained of when they are not within his knowledge; and where the act is of a simple character, an allegation of absence of care in its performance is sufficient without particularly specifying the circumstances.⁹⁵ The declaration must also establish the natural connection between the alleged wrongful act and the injury and that such negligence contributed in some degree to plaintiff's injury.⁹⁶ It is not necessary to specifically allege that a defendant was negligent and that his negligence was the result of an injury if facts are stated in the declaration from which the law raises a duty and which show an omission of the duty on the defendant's part which resulted in the injury in question.⁹⁷ An allegation that the defendant

⁸⁹ *Chicago Union Traction Co. v. Giese*, 229 Ill. 260, 263 (1907).

⁹⁰ *McAndrews v. Chicago, Lake Shore & E. Ry. Co.*, 222 Ill. 237; *Chicago & Alton R. Co. v. Clausen*, 173 Ill. 100, 105 (1898); *Ayers v. Chicago*, 111 Ill. 406, 412 (1884); *Sargent Co. v. Baubliss*, 215 Ill. 428, 431 (1905).

⁹¹ *McAndrews v. Chicago, Lake Shore & E. Ry. Co.*, 222 Ill. 232, 239 (1906).

⁹² *Langan v. Enos Fire Escape Co.*, 233 Ill. 308, 311, 312 (1908).

⁹³ *Postal Telegraph-Cable Co. v. Likes*, 225 Ill. 249, 258 (1907).

⁹⁴ *Klawiter v. Jones*, 219 Ill. 626, 630 (1906); *Barnes v. Danville Street Ry. & L. Co.*, 235 Ill. 566, 573 (1908); *Thompson v. Cleveland, Cincinnati, Chicago & St. L. Ry. Co.*, 226 Ill. 542 (1907).

⁹⁵ *Chicago City Ry. Co. v. Jennings*, 157 Ill. 274, 280 (1895).

⁹⁶ *Keeshan v. Elgin, Aurora & Southern Traction Co.*, 229 Ill. 533, 536 (1907); *McGanahan v. East St. Louis & Carondelet Ry. Co.*, 72 Ill. 557, 558 (1874).

⁹⁷ *Nall v. Taylor*, 247 Ill. 580, 586 (1910).

was guilty of negligence in failing to perform a specified duty sufficiently avers the ultimate fact of negligence.⁹⁸ In West Virginia the acts of omission or commission constituting the negligence or wrong need not be stated particularly.⁹⁹

A plaintiff cannot recover for negligent acts which are not averred in the declaration, even if such acts caused the injury; as he must recover, if at all, upon the cause stated in his declaration.¹⁰⁰ A declaration which defectively states negligence is cured after verdict.¹⁰¹

1477 Negligence; ordinance or statute, pleading

A declaration which sets up a violation of a statute or ordinance is good, and the advantage of pleading the statute or ordinance is that proof of its violation establishes *prima facie* acts of negligence.¹⁰² The violation of municipal ordinance by the defendant must be specially pleaded.¹⁰³

1478 Negligence; receivers

In an action against a receiver of a corporation for personal injuries, the declaration must allege that the receiver had possession or control of the property causing the injury, and it must charge him with negligence.¹⁰⁴

1479 Negligence; wanton and wilful, practice

In personal injury cases a plaintiff should always include in the declaration a count charging wanton and wilful negligence if there is any evidence to sustain it.¹⁰⁵

1480 Negligence; proof, presumption

A plaintiff may prove a part of a divisible charge of negligence;¹⁰⁶ and he is not bound to prove an allegation of concur-

⁹⁸ Chicago & Eastern Illinois R. Co. v. Kimmel, 221 Ill. 547, 551 (1906).

⁹⁹ Hawker v. Baltimore & Ohio R. Co., 15 W. Va. 628, 635 (1879).

¹⁰⁰ Crane Co. v. Hogan, 228 Ill. 338, 344 (1907); Lyons v. Ryerson & Son, 242 Ill. 409, 415 (1909).

¹⁰¹ Illinois Terra Cotta Lumber Co. v. Hanley, 214 Ill. 243, 245 (1905); Sargent Co. v. Baublis, 215 Ill. 432; Barker v. Koozier, 80 Ill. 206, 207 (1875).

¹⁰² United States Brewing Co. v.

Stoltenberg, 211 Ill. 531, 537, 538 (1904).

¹⁰³ Blanchard v. Lake Shore & Michigan Southern Ry. Co., 126 Ill. 416, 425 (1888).

¹⁰⁴ Henning v. Sampsell, 236 Ill. 375, 379, 380 (1908).

¹⁰⁵ Belt Ry. Co. v. Skszypeczak, 225 Ill. 242 (1907); Thompson v. Cleveland, Cincinnati, Chicago & St. L. Ry. Co., 226 Ill. 542, 544 (1907).

¹⁰⁶ Guianios v. De Camp Coal Mining Co., 242 Ill. 278, 281 (1909).

rent negligence of two or more defendants, but he may prove negligence sufficient to produce the injury of either of the defendants.¹⁰⁷ A charge of wilful and wanton negligence is sufficiently proved to sustain a judgment without proving the wilfulness or wantonness of the negligence, on the principle that in actions of tort a plaintiff may prove a part of a divisible charge of negligence, and the charge of wilful negligence is divisible.¹⁰⁸ In some cases and under some circumstances, negligence may be inferred from proven or admitted facts.¹⁰⁹

1481 Notice or knowledge; averment, proof

In personal injuries, the declaration must allege knowledge or facts from which it necessarily appears that the employer knew or had notice of a defect or a neglect of duty, unless the duty or act is of such a nature that an allegation of its nonperformance or performance necessarily involves notice and knowledge. But the failure to aver notice or knowledge is cured by verdict.¹¹⁰ An averment and proof of actual notice of the defective construction and condition of an appliance are not necessary in a declaration against the maker of the instrument.¹¹¹

1482 Due care; averment; unavoidable, test

A declaration charging common law negligence must aver due care on the part of the plaintiff when he was injured, or it must contain an averment in regard to his conduct or the circumstances surrounding him from which due care on his part may be reasonably inferred.¹¹² If such allegations are omitted, the declaration does not state a cause of action and after the period of limitations fixed by statute has elapsed cannot be amended to state a cause of action which would not be subject to the bar of the statute.¹¹³ But too general an averment of due care is cured by verdict.¹¹⁴ In West Virginia, however,

¹⁰⁷ *Pierson v. Lyon & Healy*, 243 Ill. 370, 375, 376 (1910).

¹⁰⁸ *Guianios v. De Camp Mining Co.*, *supra*.

¹⁰⁹ *Linquist v. Hodges*, 248 Ill. 491, 500 (1911).

¹¹⁰ *Sargent Co. v. Baublis*, 215 Ill. 433; *Postal Telegraph-Cable Co. v. Likes*, 225 Ill. 263; *Linquist v. Hodges*, 248 Ill. 498.

¹¹¹ *Linquist v. Hodges*, 248 Ill. 497.

¹¹² *Walters v. Ottawa*, 240 Ill. 266, 267 (1909); *Bradley v. Chicago Virden Coal Co.*, 231 Ill. 622, 627 (1908); *Blanchard v. Lake Shore & Michigan Southern Ry. Co.*, 126 Ill. 425; *St. Louis, Alton & Terre Haute R. Co. v. Holman*, 155 Ill. 21, 24 (1895).

¹¹³ *Walters v. Ottawa*, *supra*.

¹¹⁴ *Brunhild v. Chicago Union Traction Co.*, 239 Ill. 621, 623 (1909).

it is not necessary for the plaintiff to allege in his declaration that he was using ordinary care and was not guilty of negligence which contributed to the injury, such matters being defenses at common law.¹¹⁵ In alleging the grievance complained of, the word "unavoidable" means the exercise of ordinary or due care on the part of the plaintiff; it does not mean the exercise of the highest degree of care.¹¹⁶ Due care depends upon the circumstances surrounding the occasion and is to be determined with reference to the situation in which a person finds himself at the time of the injury.¹¹⁷

1483 Due care, injury to child

In an action for personal injuries to a child it is necessary to allege that the parents of the child were in the exercise of reasonable care for the child's safety, but the failure to so allege may be cured by verdict if it can be clearly inferred from the allegations of the declaration that the accident was not due to the parent's negligence and when the general issue was pleaded.¹¹⁸

1484 Due care, proof

Under an allegation that the plaintiff was in the exercise of due care for his own safety, proof of all the circumstances tending to support the allegation is admissible, including proof that the plaintiff was ordered or directed to do the work in the place or in the manner it was performed.¹¹⁹ Ordinary care may be established by circumstantial evidence.¹²⁰

1485 Custom, proof

It is not necessary to aver the existence of a custom regulating the occupation in which an injury occurs to permit evidence of the custom, if it bears directly upon the questions of contributory negligence and fellow-servant.¹²¹

¹¹⁵ *Sheff v. Huntington (City)*, 16 W. Va. 307, 313, 314 (1880); *Berns v. Gaston Gas Coal Co.*, 27 W. Va. 285, 290 (1885).

¹¹⁶ *Chicago & Alton R. Co. v. Harrington*, 192 Ill. 9, 27 (1901).

¹¹⁷ *Illinois Central R. Co. v. Siler*, 229 Ill. 390, 394 (1907).

¹¹⁸ *Illinois Central R. Co. v. Wariner*, 229 Ill. 91, 97 (1907).

¹¹⁹ *Henrietta Coal Co. v. Campbell*, 211 Ill. 216, 227 (1904).

¹²⁰ *Stollery v. Cicero & Proviso Street Ry. Co.*, 243 Ill. 293, 294.

¹²¹ *Sturm v. Consolidated Coal Co.*, 248 Ill. 28.

1486 Fellow-servant, proof

In stating negligent acts of defendant's servants, it must be averred that the injury to the plaintiff was caused by the defendant's servants who were not fellow-servants of the plaintiff; as an omission to so aver is not cured by verdict.¹²² But an omission to negative the relation of fellow-servant is cured after verdict, if the facts alleged fully show the relation of the parties and the issue joined necessarily requires proof of these facts.¹²³ An allegation that a certain person was the foreman in charge of the work and as a superior servant and vice-principal of the defendant negligently gave a certain order sufficiently charges fellow-servantship.¹²⁴ A foreman of a shop is not necessarily a vice-principal, and the fact that he was acting as such must be shown.¹²⁵

Negating fellow-servantship is essential only when the injury is caused by persons who might have been fellow-servants of the person who was injured. When the cause of the injury is the negligence of the employer himself, or, if a corporation, that of its agents or servants who acted for it, the allegation concerning fellow-servant is not an essential element of the cause of action; especially, when it appears from the averments of the declaration that the person who was injured had no connection or association with the agents or servants of the defendant through whose negligence the injury was occasioned.¹²⁶

1487 Assumed risk, instructions

The assumption of risk may be negated by proper averments in the declaration.¹²⁷ In an action for personal injuries sustained by continuing in the service after notice of a dangerous condition in the employment and a promise to repair, the declaration should aver that the danger was not so imminent that the plaintiff should have quit the services rather than incurred the risk, and that he did not remain in the employment for an unreasonable time after the promise to repair, if it is intended to ask a peremptory instruction to find for the plaintiff as charged

¹²² *Joliet Steel Co. v. Shields*, 134 Ill. 209, 214 (1890); *Schillinger Bros. Co. v. Smith*, 225 Ill. 81.

¹²³ *Bennett v. Chicago City Ry. Co.*, 243 Ill. 420, 434 (1910).

¹²⁴ *Malloy v. Kelly-Atkinson Construction Co.*, 240 Ill. 102, 104 (1909).

¹²⁵ *Burgess v. Humphrey Bookcase Co.*, 156 Mich. 345, 349 (1909).

¹²⁶ *McInerney v. Western Packing & Provision Co.*, 249 Ill. 240, 243 (1911).

¹²⁷ *Kirk & Co. v. Jajko*, 224 Ill. 338, 343 (1906).

in the declaration.¹²⁸ An averment that the plaintiff did not know, nor had an opportunity of knowing of the dangerous condition which caused the injury negatives his assumption of risk when supported by the evidence and authorizes an instruction in his behalf leaving out the element of assumed risk.¹²⁹

1488 Injury, place

Describing the place of injury as "near" a certain street is sufficient on general demurrer.¹³⁰

1489 Notice to municipality

In an action against a municipality for personal injuries, an Illinois declaration must aver the giving of notice within six months from the date of the injury, or when the cause of action accrued, regardless of when the action be brought.¹³¹ This averment is a condition precedent to the bringing of the action.¹³² In Michigan, the declaration against a municipality for personal injuries must aver the previous presentation of the claim to the common council.¹³³

1490 Survivorship; averment, practice

If an action is based upon the Death act the declaration must aver the wrongful act, neglect or default of the defendant causing the death of the intestate under such circumstances as would entitle him to maintain an action if death had not ensued, the fact of survivorship, and the names of the widow or next of kin.¹³⁴ An averment of survivorship is an essential allegation of the cause of action and must be averred in the declaration.¹³⁵ Naming one kind of next of kin will preclude a recovery in behalf of another, as the naming of certain persons as survivors is exclusive of others not mentioned.¹³⁶ The naming of parents and sisters, without stating them to be the next of kin to the deceased, merely states a cause of action defectively.¹³⁷ The failure to

¹²⁸ *Cromer v. Borders Coal Co.*, 246 Ill. 451, 456 (1910); *Scott v. Parlin & Orendorff Co.*, 245 Ill. 460, 468, 469 (1910).

¹²⁹ *Hagen v. Schleuter*, 236 Ill. 467, 474 (1908).

¹³⁰ *Karczenska v. Chicago*, 239 Ill. 483, 484, 485 (1909).

¹³¹ *Erford v. Peoria*, 229 Ill. 546, 553 (1907).

¹³² *Walters v. Ottawa*, 240 Ill. 262, 263.

¹³³ *Springer v. Detroit*, 102 Mich. 300 (1894).

¹³⁴ *Quincy Coal Co. v. Hood*, 77 Ill. 68, 72 (1875).

¹³⁵ *Lake Shore & Michigan Southern Ry. Co. v. Hessions*, 150 Ill. 556, 557; *Chicago & Rock Island R. Co. v. Morris*, 26 Ill. 400, 402 (1861).

¹³⁶ *Quincy Coal Co. v. Hood*, 77 Ill. 74.

¹³⁷ *Byrne v. Marshall Field & Co.*, 237 Ill. 384, 388 (1908).

correctly give the Christian names of some of the next of kin will not change or bar the cause of action, and may be supplied by amendment.¹³⁸ An averment of survivorship and profert of letters of administration at the end of the last count immediately preceding the conclusion is good form in a declaration which contains several counts.¹³⁹

1491 Survivorship, proof

In an action for personal injuries resulting in death, it is permissible to prove that the wife or next of kin were, at and before the time of the injury and the decease, dependent for support upon the deceased, or that he was her or their sole support.¹⁴⁰ But such evidence is not permissible when an injured person sues for damages in his own name.¹⁴¹

1492 *Ad damnum*

In actions based upon the Death act, the *ad damnum* must not claim more damages than the statute allows, if the statute limits recovery to a specific amount.¹⁴²

1493 Amendment, next of kin

In personal injury cases an amendment of the declaration which corrects the Christian name of some of the next of kin does not amount to and does not constitute a new cause of action upon which a plea of the statute of limitations can be based.¹⁴³ After the death of a plaintiff in a personal injury case, the declaration cannot be amended to permit proof of damages under the Act of 1905, because such an amendment amounts to the introduction of a new cause of action.¹⁴⁴

¹³⁸ *Grace & Hyde Co. v. Strong*, 224 Ill. 630, 634 (1907).

¹³⁹ *Lake Shore & Michigan Southern Ry. Co. v. Hessions*, 150 Ill. 577.

¹⁴⁰ *Kulvie v. Bunsen Coal Co.*, 253 Ill. 386, 392 (1912).

¹⁴¹ *Jones & Adams Co. v. George*, 227 Ill. 64, 70 (1907); *Kulvie v. Bunsen Coal Co.*, 253 Ill. 393.

¹⁴² *Hughes v. Richter*, 161 Ill. 409 (1896).

¹⁴³ *Grace & Hyde Co. v. Strong*, *supra*.

¹⁴⁴ *Fournier v. Detroit United Ry.*, 157 Mich. 589 (1909); Act No. 89, Public Acts 1905.

1494 Words and phrases, "necessary"

The word "necessary" used in a declaration for personal injuries does not mean indispensable or unavoidable, but may mean expedient or reasonably convenient.¹⁴⁵

SPECIAL CAUSES AND DECLARATIONS

1495 Air shaft, Narr. (Ill.)

¹⁴⁶ For that the defendant, in the lifetime of the said B, to wit, on or about the day of, 19.., was possessed of, controlled and managed a certain building and appurtenances thereto belonging, commonly known as and called the, in the city of, in the county aforesaid, in which said building there now is, and before and on the day aforesaid there was, a certain shaft, pit or areaway, which said building was then and there used for offices, and for the purpose of renting offices, suites and stores therein to tenants for hire; that it was then and there the duty of the defendant to have the said building and the appurtenances thereto properly and safely constructed, and to keep said shaft, pit, or areaway properly and sufficiently guarded, obstructed and protected, and to so manage said building and the appurtenances, as not to expose persons in the lawful and necessary use of said building and appurtenances, and rightfully upon said premises, to unnecessary peril, danger and harm.

Yet, the defendant, not regarding its duty in that behalf, and well knowing the premises, and while it was possessed of, occupying and managing said building and the appurtenances thereto, and while there was such shaft, pit, or areaway as aforesaid, to wit, on the day aforesaid, then and there wrongfully, negligently and wantonly permitted said shaft, pit, or areaway to be and remain so badly, insufficiently and defectively closed, guarded, obstructed and protected, that by means thereof, and for want of proper and sufficient closing, guarding, obstructing and protecting of the said shaft, pit, or areaway, and while the said B, on the day aforesaid, was rightfully in the said building of the defendant, in the proper and necessary pursuit of his lawful business, then and there necessarily and unavoidably fell into and down the said shaft, pit, or areaway, with great force and violence, and was thereby, then and there, killed.

2. That it was also then and there the duty of the defendant to keep the said shaft, pit, or areaway safely and securely

¹⁴⁵ Brooks v. Chicago, Wilmington & Vermilion Coal Co., 234 Ill. 372, 379 (1908).

¹⁴⁶ Add caption as in Section 211, Note 60, and commencement.

closed, fastened, secured and locked, so as not to expose persons rightfully in said building to unnecessary peril, danger and harm.

Yet the defendant, not regarding its duty in that behalf, and well knowing the premises, and while it was the owner of and controlling and managing the said building and the appurtenances thereto, and while there was such shaft, pit, or areaway, to wit, on the day aforesaid, then and there wrongfully, negligently and wantonly permitted the said opening to said shaft to be and remain unclosed, unfastened, unsecured and unlocked; that by means thereof, and while the said B, on the day aforesaid, was rightfully in said building of the defendant in the proper and necessary pursuit of his lawful business, then and there necessarily and unavoidably fell into and down the said shaft, pit, or areaway, with great force, and was thereby, then and there, killed.

3. That it was also then and there the duty of the defendant to have and keep the said doors closed and locked, and to remove the said keys therefrom, so that said doors would not be and become open and unlocked, and thereby expose persons rightfully in said building to unnecessary peril, danger and harm.

Yet the defendant, not regarding its duty in that behalf, and well knowing the premises, and while it was the owner of and in the control and management of said building and the appurtenances thereto, and while there was such shaft, pit, or areaway, with doors leading thereto having locks and keys, to wit, on the day aforesaid, then and there, wrongfully, negligently and wantonly permitted the said keys to remain and be in the said locks in such doors of said shaft, pit, or areaway, that by means thereof the said doors to said shaft, pit, or areaway became and were, on the day aforesaid, unclosed and unlocked; and that by means thereof, and while the said B, on the day aforesaid, was rightfully in the said building of the defendant, in the proper and necessary pursuit of his lawful business, then and there, necessarily and unavoidably, fell into and down the said shaft, pit, or areaway, and was thereby, then and there, killed.¹⁴⁷

And said B left him surviving one K B, his widow, and one B B, his son, and one A B, his daughter, and one J B, his son, and one M B, his daughter, and one G B, his daughter, his next of kin, who are still living, and by reason of the death of said B as aforesaid the said K B has been and is deprived of her means of support, and the said B B, A. B, J B, M B and G B have been and are deprived of their means of support and education; to the damage of the plaintiff, as

¹⁴⁷ *Bahr v. National Safe Deposit Co.*, 234 Ill. 101 (1908).

administratrix as aforesaid of dollars, and therefore she brings her suit, etc.

And the plaintiff brings into court here the letters of administration to her granted by the probate court of county, which give sufficient evidence to the court hereof of the grant of administration of the said estate to the plaintiff, and that plaintiff is such administratrix, and has the administration of said estate.

.....

Plaintiff's attorney.

1496 Appliances or instrumentalities; declaration requisites

In an action by an employee against an employer on account of a defective appliance, the declaration must aver that the appliance was defective, that the employer had notice or knowledge thereof, or ought to have had notice or knowledge, that the employee did not know of the defect and had not equal means of knowledge with the employer and that the employer knew of it, that the circumstances were such that the employee did not assume the risk, and that the defect was the proximate cause of the injury.¹⁴⁸

1497 Attractive machinery; action, law and fact

Persons owning or operating unguarded machinery or other objects of a dangerous character and of a nature and at a place to attract young children, are liable for injury sustained by them and caused by such machinery; the attractive nature of the machinery is a question of fact and not of law.¹⁴⁹

The doctrine of attractive nuisance is applicable: (1) Where an injury results from some dangerous element which is a part of, or which is inseparably connected with the alluring thing or device; (2) Where the injury results from some independent source, not such as will break the relation of the cause and effect, brought directly in contact with the alluring device or thing.¹⁵⁰

1498 Attractive machinery; coal conveyor, Narr. (Ill.)

For that whereas, on, to wit, the day of, 19.., the defendants were possessed of and were jointly using and

¹⁴⁸ Republic Iron & Steel Co. v. Lee, 227 Ill. 246, 257 (1907); Chicago & Eastern Illinois R. Co. v. Heerey, 203 Ill. 492 (1903); Diamond Glue Co. v. Wietzychowski, 227 Ill. 338, 342 (1907).

¹⁴⁹ Stollery v. Cicero & Proviso Street Ry. Co., 243 Ill. 292.

¹⁵⁰ Seymour v. Union Stock Yards & Transit Co., 224 Ill. 579, 585 (1906).

operating a certain powerhouse known as the, which said powerhouse was situated at the intersection of avenue and street, in the county of, and state aforesaid, and that in and about the said powerhouse the said defendants were then and there possessed of and using and operating certain machinery, and that said machinery was then and there used by the said defendants for the purpose of enabling the defendants to generate power within said powerhouse, and that said power was then and there used by the said defendants for the purpose of propelling street cars that were then and there possessed and owned and operated by the said defendants.

And the plaintiffs further aver that a part of the machinery constituting said powerhouse, and used in and about the said powerhouse, was a certain coal conveyor, that said coal conveyor then and there consisted of endless chains, running parallel to each other at a distance of, to wit, feet apart, and that certain coal conveyors were then and there attached at right angles to said chains so as to form an endless apron that was then and there used in conveying coal into and within said powerhouse of said defendants.

And the plaintiffs further aver that said powerhouse was then and there situated at a distance of, to wit, feet south of street, and that said coal conveyor then and there extended through said powerhouse from north to south, and that on the north side of said powerhouse there was then and there situated certain sprocket wheels upon which said conveyor then and there ran, and which sprocket wheels were then and there used for the purpose of supporting said conveyor while used by said defendants, and that the north end of said coal conveyor, and the sprocket wheels on which said conveyor ran, were then and there wholly unguarded and uncovered and beyond and outside of said powerhouse, and that said coal conveyor then and there ran within a distance of, to wit, foot from the ground on said north side of said powerhouse, and that said coal conveyor was then and there, and for a long time prior thereto had been operated by the said defendants at irregular intervals as the said defendants then and there might have occasion to use the same for the purpose of conveying coal.

And the plaintiffs further aver that the space betweenstreet and the north side of said powerhouse was then and there an unenclosed and vacant lot.

And the plaintiffs further aver that the said coal conveyor then and there immediately adjoining and connecting with the north side of said powerhouse of the said defendants, was

then and there, and for a long time prior thereto had been attractive to children of tender years, and then and there tended to and did incite the childish curiosity of infants of tender years, and that on the said day of, 19.., and for a long time prior thereto, a large number of infants of tender years were in the habit of, and did play in the said vacant lot, and in, on and about the said coal conveyor of the said defendants, so situated and adjoining the north end of the said powerhouse. All of which facts were then and there well known to the said defendants, or could by the exercise of reasonable care on their part have been discovered.

And the plaintiffs aver that it then and there became and was the duty of the said defendants to exercise ordinary care in and about the management of their said powerhouse, and the machinery in and about the same, and the said coal conveyor, to the end that children playing on and about the said machinery and coal conveyor, and near the said powerhouse, and attracted by the said machinery and said coal conveyor, would not be injured.

And the plaintiffs aver that on the day and year aforesaid the plaintiffs' deceased was then and there a child of tender years, of, to wit, the age of years, and in the care and custody of his mother, and that said mother was at and before the time of the accident in the exercise of ordinary care for the safety of said deceased, and that said deceased then and there resided a short distance, to wit, block from said powerhouse, and that the plaintiff's deceased was on the day and year aforesaid attracted by childish curiosity towards the said powerhouse and the said coal conveyor of the said defendants, and then and there went into said vacant lot, and over to said coal conveyor and was then and there playing about and on said coal conveyor; and the plaintiffs further aver that the said defendants then and there carelessly and negligently failed and neglected to provide a covering or fence around the said machinery and said coal conveyor, to prevent children from having access to the same, but that the said defendants then and there carelessly and negligently allowed and permitted said machinery and said coal conveyor to be and remain in an open and exposed condition; and that by and through the said carelessness and negligence of the said defendants aforesaid, and in so failing to guard or cover the said machinery and said coal conveyor, and in leaving the same exposed, the plaintiffs' deceased, while then and there playing on and about said coal conveyor, and at all times in the exercise of ordinary care for his own safety, was then and there caught in a sprocket wheel of the said coal conveyor and was then and there and thereby crushed and mangled, and plaintiffs' deceased then and there, immediately thereafter, came to his death by reason of being so crushed and mangled.

And the plaintiffs aver that the saidleft him surviving his mother as his only heir at law and next of kin, and that by reason of the death of the said the said has been and is deprived of the pecuniary aid and assistance of the said, and of her means of support. All to the damage of the plaintiffs as administrator aforesaid, in the sum of dollars; and therefore they bring this suit. (Add administration clause, as in Section 1495, last paragraph)

**1499 Attractive machinery; torpedo in railroad yard, Narr.
(D. C.)**

For that heretofore, to wit, on and prior to the day of, the defendants the W and W S kept, maintained, operated and controlled upon the land and premises and right of way of the defendant W S in the county of certain cars known as repair cars upon which the agents and servants of the defendants were employed; and the said defendants for the purpose of protecting their property and the lives of their employees from danger of accident and collision with railroad cars and locomotives and for the purpose of warning approaching cars and locomotives at any place or time of persons on the repair cars of the defendants on said railroad tracks, kept and used among other things, a certain kind of device, contrivance and apparatus called a torpedo, containing a powerful and dangerous explosive designed to be capable of being set off by concussion, and said torpedo was so charged and loaded with an explosive that any person being in close proximity to the same at the time of it being exploded and set off might and could be much hurt, maimed, disabled and wounded; that a part of said railroad lands and premises and right of way in the said county of immediately north of the corporate limits of the city of, runs along and near a settlement and large number of dwelling houses in said county collectively known as, whereupon, the day and year aforesaid, and a long time prior thereto, a large number of children resided.

And the plaintiff further avers that on the date aforesaid and prior thereto and at the place aforesaid there ran parallel to the main line tracks of said defendant railway company certain lines of tracks known as side tracks to which the repair cars of the defendants were transferred by means of switches so that said cars of defendants would remain stationary for a long time at the place aforesaid without obstructing the main line tracks of the defendant railway company; and the plaintiff avers that for a long time, to wit, for months or more preceeding and up to the day and date last above mentioned a large number of children

residing at and in the neighborhood of aforesaid, were in the habit of and accustomed to play upon, around and about the said switches and siding where the repair cars of the defendant telegraph company and the defendant railway company were located, and to converse and play with the agents, servants and employees of said defendants living and working upon and about said repair cars; of all of which the said defendants had notice. And thereupon it became and was the duty of the said defendant telegraph company, and the said defendant railway company, their agents and servants, not to place or permit to be placed, or to suffer any of their said torpedoes to remain upon the ground and premises of said railway company at the place aforesaid, unguarded, without notice or warning where such torpedoes would attract the attention, interest, instinct, or curiosity of children entering upon and accustomed to play upon said premises; and it became and was the duty of the defendant telegraph company and the defendant railway company not to leave or permit any of their torpedoes to remain upon the ground and premises aforesaid without taking due, proper and reasonable means and care to prevent a child of tender years from ignorantly and unwittingly and through childish thoughtlessness causing any of the torpedoes of said defendants to explode.

Yet, the said defendants, their agents and servants, disregarding their duty in the premises did carelessly and negligently place and permit to be placed and left upon the ground and premises and right of way of the said railway company at the time and place aforesaid, unguarded and without notice or warning, a torpedo as aforesaid, where said torpedo would attract the attention, instinct, interest and curiosity of children entering upon the said premises and right of way as aforesaid; and the said defendants did leave and permit the torpedo as aforesaid to remain upon the ground and premises aforesaid without taking due, proper and reasonable means and care to prevent any person from ignorantly and unwittingly and through childish instinct and thoughtlessness causing such torpedo to explode, and without labeling or marking such torpedo so as to disclose its nature and so as to prevent children entering upon said premises as aforesaid from exploding the said torpedo, through ignorance, curiosity or childish instinct or thoughtlessness.

And on, to wit, the day of, the plaintiff, an infant of the age of years, residing at said place called, in said county of, in the vicinity and neighborhood of the spot where the said defendants, their agents and servants had left one of the torpedoes aforesaid upon the ground, entered with other children upon the premises aforesaid, and while there her childish instinct and curiosity were attracted to the tor-

pedo aforesaid which the said defendants, their agents and servants had so as aforesaid carelessly and negligently left upon the ground where the said defendants, their agents and servants knew, or in the exercise of due and reasonable caution and care should have known that such torpedo would attract the attention, interest, curiosity and instinct of children residing in that vicinity and neighborhood accustomed as aforesaid to play about said repair cars and siding; and the said plaintiff,, then and there and through such childish instinct, curiosity, ignorance and thoughtlessness as might have been expected from a child of her age, picked up the torpedo aforesaid and thoughtlessly and ignorantly believing the same to contain money endeavored to open the same by striking it with a stone, when said torpedo exploded with great force and violence near the face of said plaintiff and permanently injured her so that the sight of her right eye was totally destroyed and the sight of her other eye was permanently impaired, and both eyes of the said infant and her face and hands and arms were lacerated, bruised and wounded and the said infant was otherwise injured, bruised and wounded and made sick, sore, lame, disabled, and the said infant did then and there suffer great mental and bodily pain and distress which has endured for a long space of time, to wit, from thence hitherto, and the said infant will continue to suffer great mental anguish and bodily pain and inconvenience, and has been rendered forever incapable of attending to any business or occupation as she would otherwise have been able to do; and the said defendant W S, their agents and servants other wrongs and injuries to the said plaintiff did commit.

And the said infant plaintiff avers that the said wrongs and injuries were done, caused and occasioned by the carelessness, negligence and want of due and reasonable care on the part of said defendant W and the said defendant W S, their agents and servants, in carelessly as aforesaid, and negligently as aforesaid, placing and leaving and causing to be placed and left exposed, unguarded and unprotected, and without notice or warning to the plaintiff, upon the said premises at the place aforesaid, the torpedo aforesaid in the neighborhood aforesaid, to the great wrong and injury of the said plaintiff in the sum of dollars.

1500 Backing train, injuring flagman, Narr. (Ill.)

For that whereas, heretofore, to wit, on the day of, 19.., at, to wit, the county aforesaid, the defendant was the owner of, possessed of, and had control of a certain railroad together with branches, switches and connecting lines one with another which said railroad then extended with its many wings, switches and sidetracks from the main line of the

road to the Illinois State Fair grounds. That among the many sidetracks or connecting branches of said railroad there extended a certain sidetrack or branch track of defendant's to said main track of railroad leading from the southeast corner of the Illinois State Fair grounds south and east to a distance of about feet, where said branch track of defendant's said railroad connects or intersects with its main line of tracks.

And the plaintiff avers that defendant's said railroad track as aforesaid was constructed in such a way, that at a certain point about feet south of the southeast corner of said Illinois State Fair grounds, said railroad of defendant makes a curve to the east, the same being the shape of a semi-circle. That on the east side of said curve of defendant's railroad track there stand several large buildings so that anyone who might be at or near the said southeast corner of said Fair grounds cannot see a train of cars on account of said buildings so standing near thereto.

And the plaintiff avers that the said defendant on the day and year aforesaid, at the county aforesaid, operated, used and controlled a certain number of passenger coaches with a certain locomotive engine attached thereto, commonly called a passenger train, which said train of passenger coaches was then and there used and operated by defendant over and upon its said railroad as aforesaid for the purpose of conveying persons back and forth to and from said Illinois State Fair while the same was in session.

And plaintiff avers that the place at the said southeast corner of said Illinois State Fair grounds as aforesaid was one of the main entrances of said Fair grounds and was then and there crossed and intersected by two public highways known as the and That there were constantly teams, foot-passengers and vehicles passing to and fro over and upon a certain public crossing there and the same being a place of extraordinary danger during the time that said Illinois State Fair was being held on account of the same being used as the main entrance to said Fair grounds.

And plaintiff avers that there was constructed and maintained by the another side track or branch railroad leading from its main track or road, along, over and upon said public highways, at and parallel with defendant's branch track which said branch railroad of said was then and there near to and entered said State Fair grounds along and on the west side of defendant's said track or railroad at said southeast corner of said Illinois State Fair grounds. That by reason of the two railroads as aforesaid being close together and both crossing over and upon the said public highways as aforesaid, and by reason of the many wagons, trains and vehicles and many foot passengers crossing and re-crossing over and upon said public highways where

said railroad of the said and defendant's said railroad enters said southeast corner of said Illinois State Fair grounds, it then and there became and was necessary for the safety of travel then and there to have some person at said place to act as flagman and warn travelers of the approach of the said trains when the same were coming into or going out of the said Illinois State Fair grounds, as aforesaid. And the plaintiff avers that the deceased,, was then and there in the employment of the in the capacity of flagman at a place where the said crosses or intersects with the said public highways as aforesaid. That the place where the deceased had to perform his duty as such flagman, and where the said had to stand for that purpose, was at and near the defendant's said railroad and upon said public highway.

And the plaintiff avers that it then and there became and was the duty of the defendant to so operate and control its said locomotive engines and train of cars so that it might be reasonably safe for the said to discharge his duty as such flagman for the said company, while in the exercise of ordinary care for his safety.

Yet, the defendant did not observe its duty in that behalf, but on the contrary it negligently and carelessly, through its agents and servants, caused one of its certain locomotive engines with said train of cars attached thereto, to be backed in a northerly direction over and above and upon its said track then and there back to and into and towards the said entrance of the said Illinois State Fair grounds, at a high and dangerous rate of speed, and negligently and carelessly then and there failed to give the said any warning whatever of the approach of its said train of cars. That by and through the careless conduct and neglect of duty of defendant in that regard and by reason of the defendant's said train suddenly coming around said curve of defendant's said track as aforesaid and by reason of the said being unable to see the approach of defendant's said train of cars so operated by defendant as aforesaid, in the manner as aforesaid, and by reason of defendant's failure to keep a proper lookout, and by reason of defendant's not having sufficient appliances on its said train of cars at the rear end thereof so that it could control the same, and by reason of the improper control and management of its said train in that regard through its said servants and agents, the plaintiff's intestate,, who was then and there in the employment of the said as flagman for its said trains as aforesaid, and while he the said was then and there in the exercise of due care and caution for his own safety, and while in the discharge of his duty and employment as such flagman as aforesaid, defendant's certain train of cars with its said locomotive engine attached

thereto, struck with great force and violence then and there against the body of the said and thereby then and there the said was thrown with great force and violence to and upon the ground there and thereby received injuries from which he shortly thereafter died.

And plaintiff avers that by reason of the death of the said his next of kin consisting of his children,,, who survive him are deprived of their means of support and education, and plaintiff his widow is deprived of her means and support in consequence thereof. To the damage, etc. (Add last paragraph of Section 1495)

1501 Backing train, injury to passenger, Narr. (Fla.)

That the defendant is a common carrier, engaged in said county and state in the regular business of operating railroad lines, and thereon by its servants and employees operating railroad trains and carrying and transporting passengers and freight for hire; and as such, on and before and since that date, was in the possession and control of the certain line of railroad track extending from to, in said county, and the certain engines, cars, machinery, and appliances used thereon and operated therewith, commonly known and designated as the "..... railroad;" and operated and used said track, cars, engines, machinery, and appliances in carrying on its said business.

On the said day of, 19.., the plaintiff was a passenger on a certain train operated on said line of railroad by the defendant, and the defendant, for a certain sum of money to it then paid, received the plaintiff as a passenger. and then and there undertook and agreed to safely carry the plaintiff on said train from to on said line of railroad. Before reaching, and at a regular station of the defendant on said road known as, the train on which plaintiff was a passenger was stopped by defendant and there waited for a long time, to wit, about minutes, for the arrival at of another train on defendant's railroad.

Plaintiff further says that when said train was stopped, as aforesaid, at, the locomotive engine which was attached to and drawing said train was by defendant uncoupled and detached from the cars provided for and used by the passengers on said train, and moved, with a car or cars which it was drawing, to another railway track or tracks of the defendant, and that the car in which said plaintiff was a passenger, and other cars carrying passengers, on said train, were left standing at said station called; that while said passenger cars were so standing still, and while the plaintiff was on the platform extending from and between said passenger cars and connecting the same, the defendant

negligently and carelessly caused said locomotive engine to be run backward with great force and violence against said passenger cars so standing on said track, and thereby caused the plaintiff to be thrown over and between the platforms of said passenger cars, and the plaintiff's right foot to be caught between the buffers of said passenger car platforms, whereby the plaintiff's right foot was wounded, crushed, broken, and greatly and permanently injured.

Plaintiff avers that the defendant and its agents and servants did not exercise all reasonable care and diligence in running its said locomotive engine and cars, and did not use and exercise all reasonable care and diligence in running said locomotive engine backward against said passenger cars, and that the said injury to the plaintiff was caused by the carelessness and negligence of the defendant and its agents and servants in running said engine and cars and by the failure of the defendant and its said agents to use and exercise the reasonable care and diligence required by law; that the defendant ran its said locomotive engine against said passenger cars with great and unnecessary force and violence; that said defendant, when bringing and running its said engine against said passenger cars, and when about to bring and run said engine to and against said cars, gave no signal, notice, or warning of the approach of said engine, or that the same would be brought or run to and against said cars; that the defendant, in running its said locomotive engine and train of cars, did not provide and use on and between said passenger cars a certain appliance known as a "buffer iron," which said appliance is a metal plate covering the space or opening between the ends or buffers of cars used for passengers, and which appliance was and is necessary for the safety and security of passengers on railway trains occupying the platform of the cars, and in getting on and off said cars, and in going from one car to another car on the same train, and is generally and commonly used by common carriers and railway companies as a means of protection and safety for passengers and employees on railroad trains.

By means of which negligence and want of care on the part of the defendant, its agents and servants, and by reason of which failure and refusal on the part of the defendant, its agents and servants, to exercise and use all reasonable care and diligence in running its said locomotive engine and cars, the plaintiff has sustained the injuries as aforesaid, and has lost the use of her foot, has become permanently maimed and crippled, has suffered great pain and anguish of body and mind, has been made sore and sick, and her health and strength of body have been permanently impaired, injured, and damaged. Wherefore, etc.

1502 Boiler bursting, Narr. (Ill.)

For that whereas, on or about the day of, 19.., the defendant,, owned, operated and controlled a certain then boiler, with certain then flues attached for the purpose of developing power to propel certain then machinery in its plant; that on the day and date last aforesaid, plaintiff's intestate was in the employ of said defendant as a fireman or water tender, and was engaged in the execution of said usual and customary duties for the defendant, his employer; that it then and there became and was the duty of the defendant to use care to furnish plaintiff's intestate with a reasonably safe appliance and to keep the appliances in and about where plaintiff's intestate was required to work in a reasonably safe condition; but that the defendant wholly failed in its duty in this behalf and, on the contrary, while the plaintiff's intestate, in the exercise of all due care and caution for his own safety, was working in a certain then pit in front of the firebox of said boiler, the defendant negligently and carelessly suffered and permitted a certain then flue to be and become defective, in this, that said flue, at a certain portion thereof, was negligently suffered and permitted to become thin, and much thinner than other portions of the said flue, and much thinner than was usual and customary in such flues; all of which the defendant well knew, or in the exercise of reasonable inspection could have known, and of which plaintiff's intestate was ignorant and had no opportunity of knowing; so that, by reason of the negligence of the defendant, as aforesaid, in furnishing said flue, which was then and there defective, as aforesaid, said flue by reason of said defects then and there exploded, and blew out; and that by reason of the premises, large quantities of boiling water and steam were thrown and projected down and upon plaintiff's intestate in said pit, and by reason of the premises plaintiff's intestate was killed. (Add last two paragraphs of Section 1495)

1503 Breaks defective, Narr. (Ill.)

For that whereas, heretofore, to wit, on,, 19..,, to wit, at the county aforesaid, the defendant was possessed of a certain car loaded with iron ore which was located on a certain trestle work or elevated track a great distance, to wit, feet above the ground there, in which said car was a certain aperture or chute through which ore from said car was unloaded, and in order that said car might be unloaded safely it was necessary that the wheels thereof be locked by a brake or in some way fixed or secured so that said car would not move nor jerk while ore was being unloaded from said car and thereby throw from said car the persons engaged in unloading the same; and it then and

there became and was the duty of the defendant to have and keep said car and the brake and all parts thereof in good and safe repair and condition so that the wheels of said car could be tightly locked and rendered immovable by said brake and not to set any of its servants at work unloading said car unless the wheels thereof were locked or so fixed or secured that said car would not move or jerk while the same was being unloaded, and to furnish its servants whom it might set to unloading said car a safe place to work. Yet the defendant, not mindful of its duty in this regard, carelessly and negligently had and kept said car in bad and dangerous condition and repair, and the brake thereof out of order, so that the same would not work and lock the wheels of said car, and carelessly and negligently had said car standing on said trestle or elevated track without the wheels thereof being locked or fixed or secured so that said car would not move or jerk while the same was being unloaded.

And the plaintiff was then and there a servant in the employ of the defendant and the defendant then and there carelessly and negligently ordered the plaintiff to go upon said car and unload ore from the same, and the plaintiff then and there, without fault or negligence on his part, in obedience to said order of said defendant, went upon said car and proceeded to unload ore therefrom, when without fault or negligence on the part of the plaintiff, and by reason of the careless and negligent misconduct of the defendant aforesaid, said car suddenly and violently moved or jerked and threw the plaintiff from said car to and upon the ground there; by means of which said premises, to wit, six of the plaintiff's ribs were broken and his legs and arms were broken and divers other bones of the plaintiff were broken, and his hips were dislocated and divers other of his joints were dislocated, and one of the plaintiff's legs was greatly and permanently shortened, and the voice, sight and hearing of the plaintiff were greatly and permanently lessened and impaired, and the plaintiff was rendered permanently subject to headaches, roarings in the head and vertigo, and the plaintiff suffered severe and permanent internal injuries, and the arms and shoulders of the plaintiff were greatly and permanently injured and crippled, and the plaintiff was rendered permanently incapable of working as a laborer, at which employment he had theretofore earned large sums, to wit, \$. a day, and was rendered permanently incapable of doing any work. And also by reason of the premises the plaintiff suffered great and excruciating pain and agony and will permanently suffer the same in the future. And the spine of the plaintiff suffered a severe concussion, and was greatly and permanently injured. And the nervous system of the plaintiff was greatly broken, shattered and permanently injured. And the plaintiff was put to a great expense, to wit, an expense of \$. for medical attendance,

medicines and nursing, in endeavoring to be cured of the injuries aforesaid, and will be obliged to incur like expenditures permanently in the future for the same purpose; and also by reason of the premises the plaintiff has thence hitherto been, and permanently in the future will be unable to attend to his ordinary affairs and business; and also by reason of the premises the plaintiff has been and is otherwise greatly injured, to wit, at the county aforesaid. Wherefore, the plaintiff says he is injured and has sustained damages in the sum of (\$) dollars, and therefore he brings his suit, etc.¹⁵¹

(Virginia)

For this, to wit, that before and at the time of the commission of the grievances and wrongs hereinafter complained of, to wit, on the day of, 19.., the said defendant company was the owner, user and occupier, as a common carrier, of a certain line of railway, extending from the city of, in the state of Virginia, thence northward by one of its stations named, in the county of, and thence to the city of, in said state; that said defendant used said line of railway for the purpose of propelling and running thereon by steam its locomotives, engines and cars, and also the cars of other railway companies, for the transportation of passengers and freight; and said defendant company had, used and maintained at certain of its stations, along its railway line, and especially at said station of, certain side tracks upon which it also propelled its engines, locomotives and cars, for the purpose, amongst other things, of making up, shifting, moving and placing the said cars and its trains thereon, or in detaching from its trains certain of said cars and leaving them temporarily upon said side tracks in the course of its business as a common carrier.

And the plaintiff avers that while the defendant company was engaged, as aforesaid, in the business of a common carrier, before and on the day aforesaid, it had in its employment for the purposes aforesaid a large force of servants, consisting in part of conductors, engineers, firemen, flagmen and brakemen, to operate and run its trains, both passenger and freight, over its said railway and over and along its side tracks aforesaid at its stations aforesaid; and amongst the servants aforesaid in the employment of defendant company was plaintiff's intestate, whose duty was, among other things, to assist in running and operating said trains and said cars over and along said railway line, and in shifting and changing cars, taking them up and leaving them at said stations and on the side tracks aforesaid, and especially at said station of, on and before the day aforesaid. And among the duties especially required of plaintiff's intestate was that of manip-

¹⁵¹ Eyllenfeldt v. Illinois Steel Co.

165 Ill. 185 (1897).

ulating the brakes upon the cars in the operation of which he was aiding as an employee of said company, both on said main line and its side tracks.

Plaintiff avers that it then and there became and was the duty of the defendant company to use reasonable and ordinary care in the grading, building and constructing its said railway line and its side tracks, and especially at the said station of, so as to have and maintain them in a reasonably safe condition for its servants and employees to operate its trains and cars (whether said trains were intact or detached) with safety to life and limb, and whether its cars were connected with or disconnected from its engines and locomotives; and at all times was it defendant's duty to use ordinary care to warn, guard and protect its servants and employees against such accidents and casualties as might be reasonably foreseen and prevented by said defendant company; and especially was it its duty to use ordinary care in so grading and maintaining its main line and side tracks and in so providing and equipping its engines, locomotives, trains and cars with proper and adequate brakes as to avoid injury to its servants and employees in their use and operation. And especially was it the duty of said defendant company in operating its engines, locomotives, trains and cars on said side tracks, for the purposes aforesaid, that is to say, for the purpose of shifting its cars from one track to another or taking up cars standing on said side tracks by connecting them with its engines, locomotives, trains and other cars, or detaching cars from its train and leaving them on said side tracks, to use ordinary care in so governing, controlling and moderating the speed of its engines, locomotives, trains and cars, whether connected or disconnected with its engines or locomotives, as to avoid by any violent collision between the stationary and moving cars, or train of cars, casualties and injuries to its employees and servants then and there operating them. Yet, the defendant company, regardless of its duty in this behalf, did not use reasonable and ordinary care in grading, building and constructing its said railway lines and its side tracks, especially at the said station of, so as to have and maintain them in a reasonably safe condition for its servants and employees to operate its trains and cars for the purposes aforesaid; and it did not use ordinary care in so providing and equipping its engines, locomotives, trains and cars with proper, adequate and sufficient brakes as to avoid injury to its servants and employees, but was careless and negligent in the performance of its duty in the respects aforesaid at said station of, on the day and year aforesaid.

And plaintiff avers that at said station of on the day and year aforesaid said side track was improperly and negligently constructed, in this, to wit, that for the purpose of

operating or moving said train of cars, or any of them, when detached from its engine and without the control of its engine properly and adequately equipped with brakes, the grade was too great for the safe movement of any one or more of its cars in a southerly direction, which was down grade, from a point on said side track nearly opposite its station, unless the said cars were adequately and properly equipped with brakes.*

And plaintiff avers that on the day and year aforesaid, while one of defendant's freight trains was at said station of, northward bound in the course of its business, its engine, locomotive, tender and several of its cars, coupled to said engine or locomotive and severally and consecutively linked together, composing a part of its train, was moved from said main track to said side track under the direction and order of its conductor who carelessly and negligently, without the exercise of ordinary care, caused some of said cars to be cut loose or disconnected from said engine while upon said side track, for the purpose of being propelled in a southern direction and on a down grade to where was stationed one or more cars upon said side track, for the purpose of being connected with the latter and subsequently moved with them from said side track on to said main track, or for the purpose of being left upon said track along with, and coupled to, said stationary cars; and it then and there became the duty of plaintiff's intestate to ride upon one of the said cars, and as they approached said stationary cars to tighten the brakes upon said car for the purpose of moderating the speed of said moving cars and preventing a violent and dangerous collision of said moving cars with those standing upon said side track. But, owing to the defective and inadequate condition and character of the brakes attached to the car upon which plaintiff's intestate was riding and the steepness of the downward grade, the momentum of the cars being increased by the steepness of the grade, plaintiff's intestate, notwithstanding he tightened said brakes to the best of his ability, was unable to check or moderate their speed and the car upon which he was riding came in contact with said stationary cars with such degree of violence that the plaintiff's intestate was precipitated to and upon said side track, said stationery cars were propelled from their position and plaintiff's intestate was run over by the car upon which he had been riding, both of his legs and one of his arms were cut off, and his death shortly thereafter, to wit, in a few hours, occasioned thereby. And plaintiff says that by the wrongful act, neglect and default of the said defendant company in not using ordinary care in having and maintaining a properly graded side track at said station, and especially in negligently causing said cars to be cut loose from the engine and propelled down said side track whose steep grade was well known to defendant when the car aforesaid, upon which his intestate was riding, was not pro-

vided with proper and adequate brakes at the time and place aforesaid, as was well known to defendant, his intestate suffered the injuries aforesaid and lost his life. And plaintiff avers that the injury suffered as aforesaid by his intestate resulted from the negligence of an agent of said defendant company of a higher grade of service than that of his intestate, and from that of a person employed by said company having the right and charged with the duty of controlling and directing the general services, or the immediate work, of plaintiff's intestate, to wit, its conductor.

2. (Consider first count to star as here repeated the same as if set out in words and figures.)

And plaintiff avers that on the day and year aforesaid, while one of the defendant company's freight trains was at said station of, northward bound in the course of its business, its engine, locomotive, tender and several of its cars composing a part of its train was, by order of the conductor of said train who under the rules of said defendant company had control and management of said train and all of the servants of said company connected therewith, moved from said main track to said side track. And plaintiff further avers that said engine or locomotive was not then and there properly provided with safe, adequate and sufficient brakes. And plaintiff further avers that said engine or locomotive, with several cars attached to it, as aforesaid, was by its engineer negligently and carelessly and without using ordinary care started backward along and down said side track in a southerly direction at a high, immoderate and dangerous rate of speed and when said engine with the cars attached to it approached certain cars standing further down said side track its engineer endeavored in vain to moderate or lessen its speed, because said brakes attached to said engine were inadequate and insufficient to control it, and by reason of the defective condition and character of said brakes, of which said engineer and conductor had previous knowledge, said cars whose momentum was increased by said downward grade came in contact with certain cars standing upon said side tracks with great force and violence, and plaintiff's intestate, who, in the performance of his duty, was riding upon the car which collided with said stationary car, was precipitated by reason of the violence of said collision in and upon said side track and was run over by the car upon which he had been riding, his legs and one of his arms were cut off and his death occasioned thereby.

And plaintiff says that by the wrongful act, neglect and default of the said defendant company, in not using ordinary care in equipping and providing the said engine with adequate, safe, proper and sufficient brakes, at the time and place aforesaid and for the work aforesaid, in which plaintiff's intestate was required by defendant company to take

part, and by reason of the want of ordinary care on the part of said conductor in causing said engine and cars to be transferred to said track and allowing them to be propelled along the same in the manner aforesaid regardless of the condition of said brakes and said grade, and by reason of the want of ordinary care on the part of said engineer in propelling said engine and cars along said side track in manner aforesaid, regardless of the condition of said brakes and said grade, his intestate suffered the injuries aforesaid, and his death was occasioned thereby.

3. (Consider first count to star as here repeated the same as if set out in words and figures.)

And plaintiff avers that on the day and year aforesaid, while one of the defendant's freight trains was at said station of, northward bound in the course of its business, its engine, locomotive, tender and several of its cars coupled to said engine or locomotive and severally and consecutively linked together, composing a part of its train, was moved from said main track to said side track, by the order and command of the conductor of said train, for the purpose of being propelled in a southern direction and on a down grade to where was stationed one or more cars upon said side track for the further purpose of being connected with the latter and subsequently moved with them from said side track on to the said main track, or for the purpose of being left upon said side track along with, and coupled to, said stationary cars.

And plaintiff further avers that after said engine and the cars attached to same had reached said side track, for the purpose aforesaid, some of the cars attached to said engine were negligently, carelessly and recklessly, and without the exercise of ordinary care, cut loose from, or disconnected from, said engine, or the cars next to said engine, and turned loose upon said downward grade by one or more of its brakemen who were agents or servants of said defendant company, for the purpose of being sent or allowed to roll to said stationary cars for the purposes aforesaid, after reaching said stationary cars; and it then and there became the duty of plaintiff's intestate to ride upon one of said cars as they moved along said side track in the direction of said stationary cars, and, as they approached said stationary cars, to tighten the brakes upon the car upon which he was riding for the purpose of moderating or lessening the speed of said moving cars and preventing a violent and dangerous collision of said moving cars with those standing upon said side track. But owing to the defective and inadequate condition and character of the brakes attached to the car upon which plaintiff's intestate was riding and the downward grade, the momentum of the cars being increased by said downward grade, plaintiff's intestate, notwithstanding he tightened said brakes to the

best of his ability, was unable to check, lessen or moderate the speed of said cars, and the car upon which he was riding came in contact with said stationary cars with such degree of violence that plaintiff's intestate was precipitated to and upon said side track. Said stationary cars were propelled from their position by the impact and plaintiff's intestate was run over by the car upon which he had been riding and both of his legs and one of his arms were cut off and his death shortly thereafter, to wit, in a few hours, was occasioned thereby.

And plaintiff further says that it was the duty of the conductor of said train to supervise, control and direct its movements; to control, govern and direct the engineer, brakemen, firemen, flagmen and all of the servants of the said company connected with said train, all of whom were subordinate to and subject to his authority; and it was especially the duty of the said conductor to prevent said cars from being cut loose from said engine while upon said side track in order that the engine to which said cars were attached might aid in governing, controlling, moderating and checking the speed of said cars and train in its movement down said side track towards said stationary cars and, in that way, avoid a violent and dangerous collision between said moving cars or train of cars and said stationary cars.

And plaintiff says that said conductor did not prevent or attempt to prevent the servants of said company, to wit, its brakemen, from severing said train of cars upon said side track, as it was his duty to do, and in said omission and failure he did not exercise ordinary care, but negligently, carelessly and recklessly failed to perform his duty in that respect.

And plaintiff says that by the wrongful act, neglect and default of said defendant company in not using ordinary care in having and maintaining a properly graded side track at said station, and in negligently causing said cars to be cut loose from said engine and allowing them to roll down said track, whose downward grade was well known to said defendant company, and in failing to provide and equip said car upon which plaintiff's intestate was riding with proper and adequate brakes, whose defective character was also well known to the defendant, and also in consequence of the negligence of the said conductor and his want of ordinary care in failing to prevent one or more of defendant's servants from severing said train of cars, said conductor having the right to control the brakemen and servants of said company who cut said train of cars in twain upon said track, his intestate suffered the injuries aforesaid and his death was occasioned thereby.

4. (Consider first count to star as here repeated the same as if set out in words and figures.)

And plaintiff avers that on the day and year aforesaid, while one of the defendant's freight trains was at said station of, northward bound in the course of its business, its engine, locomotives, tender and several of its cars coupled to said engine or locomotive and severally and consecutively linked together, composing a part of its trains, was moved from said main track to said side track by the order and command of the conductor of said train, for the purpose of being propelled in a southern direction and on a down grade to where was stationed one or more cars upon said side track for the further purpose of being connected with the latter and subsequently moved with them from said side track on to the said main track, or for the purpose of being left upon said side track along with, and coupled to, said stationary cars.

And plaintiff avers that after said engine, with the cars attached to it, had reached said side track for the purposes aforesaid, the engineer in charge of said engine, and the cars attached to it, negligently and carelessly and without the exercise of ordinary care caused said cars, either while they were coupled to and connected with said engine, or after they had been severed therefrom, to be propelled down said side track in a southerly direction at a high and dangerous rate of speed which was accelerated by the down grade of said side track, and negligently and carelessly and without the exercise of ordinary care caused the advance car, propelled as aforesaid down said track, to collide with the car which was stationed upon said side track with such degree of violence that plaintiff's intestate, who was riding upon said advance car and endeavoring to check and minimize the speed of said cars by tightening the brake of the car upon which he was riding, as it was his duty to do, was precipitated by reason of said violent collision in and upon said side track, and was run over by said car, the wheels of which cut off one of his arms and both of his legs, and his death was occasioned thereby.

And plaintiff says that by the wrongful act, neglect and default of the said defendant company, whose servant and agent the engineer aforesaid was, in manner and form aforesaid, his intestate suffered the injuries aforesaid and his death was occasioned thereby; by reason of all of which said plaintiff hath a right to recover of said defendant company the sum of dollars.

And therefore he brings this suit.

1504 Bridge, collapse, Narr. (Md.)

For that the said defendant is a corporation duly incorporated and on the day of, 19.., at county, aforesaid, was engaged and for some time

theretofore had been engaged in the erection and construction of a bridge across the river at, in the county and state aforesaid; that said defendant was then and there placing the structural iron or steel work used in the erection of said bridge upon piers or abutments which had lately theretofore been constructed of cement, sand and stone and commonly called concrete work, and which concrete piers or abutments stood about equi-distant from each other across said river; that this plaintiff was then employed by the defendant and was then and there the servant of the defendant and engaged in the work of placing said structural iron or steel work on said piers or abutments, and was then and there using due care and caution on his part; that whilst this plaintiff was so engaged in his aforesaid work it became and was the duty of the defendant to exercise all reasonable care to furnish, provide and maintain a reasonably safe place for this plaintiff to perform his work, aforesaid, and to avoid exposing this plaintiff whilst so employed to any extraordinary and unreasonable peril, against which this plaintiff from want of knowledge and skill could not by the exercise of due care on his part guard himself.

Yet, the defendant well knowing its duty in the premises, and well knowing or by the exercise of reasonable care and caution on its part could have known that a certain one of said piers, to wit, pier known as "Pier No. ...," was, then and there, and at that time, to wit, on the morning of, 19.., green, weak, defective and of insufficient strength to carry the weight for which it had been constructed, and well knowing that this plaintiff by reason of lack of the requisite scientific knowledge, skill and experience could not by the exercise of ordinary care and prudence guard himself against the weakness, defectiveness and insufficient strength of said Pier No. ..., negligently ordered and directed this plaintiff to proceed with his work of placing said structural iron or steel work upon said Pier No. ..., and whilst so engaged, to wit, on, 19.., at county, aforesaid, and whilst this plaintiff was using due care and caution on his part, the said Pier No. ..., by reason of its weakness, defectiveness and insufficient strength collapsed and broke down under the weight of said structural iron or steel work, and this plaintiff by reason of the defendant's negligence aforesaid, was hurled and thrown from said bridge many feet into the river below and thereby was greatly injured by having a great gash cut in the head, left leg broken and shattered, angle and left foot crushed, right knee-cap and joint crushed and ligaments torn, hips and back injured; whereby and by reason thereof this plaintiff has

been permanently injured, has suffered and still suffers great pain and has been put to very great expense for doctors fees and hospital bills.

And this plaintiff claims \$. damages.

1505 Bridge, guards or railings, Narr. (Ill.)

For that whereas, before and at the time of the committing of the grievances by the defendants as hereinafter mentioned, the defendants were acting as the commissioners of highways of the township of in the county of and state of Illinois, and as such commissioners had the care, supervision, possession and control of a certain public highway between sections (fourteen and fifteen) in said township, and it was their duty to keep said highway in good and safe repair and condition for travel, and to build and maintain proper and suitable bridges in said highway where it was crossed by creeks, water-courses and drains so as to furnish safe passage for plaintiff and every person traveling along said highway with a wagon drawn by a team of horses; and whereas the defendants then and for a long time prior thereto had adequate funds and material, and labor at their command with which to keep said highway and bridges in good and safe repair and condition and to build and maintain proper and suitable bridges in said highway as aforesaid; yet the defendants, not regarding their duty in that behalf while they so had the care, supervision, possession and control of said highway, wrongfully, negligently and unskillfully built and permitted to be built, and remain a certain bridge in said highway between sections (fourteen and fifteen) in said township of across and over a certain creek, water-course or drain, of timbers and plank, so narrow as to be dangerous to cross with a team and wagon in case said team should deviate slightly from the center thereof, and without any railing and side truss, or anything whatever above the plank flooring of said bridge to prevent a wagon or team from going off of the side of said bridge, said bridge being of such a length, width and height above said water-course, creek or drain as to be very unsafe and dangerous to persons driving across the same; by reason whereof, and, to wit, on the day and year aforesaid, and at the county aforesaid, and while the plaintiff was driving across said bridge with all due care, skill and diligence in a certain wagon drawn by a certain team of horses, said horses, suddenly took fright and swerved to one side, whereby the said team of horses and wagon with the plaintiff were necessarily and unavoidably precipitated from off the side of said bridge to and upon the ground below, then and there injuring and bruising the plaintiff and thereby breaking his left leg near the hip joint, and his left leg became shrunken and lame and he became sick,

lame and disordered, and so remained for a long time, to wit, from thence hitherto, during all which time he thereby suffered great pain, and was hindered from transacting his business affairs, and also by means of the premises, he was obliged to and did lay out divers sums of money, amounting to, to wit, dollars, in and about endeavoring to be healed of said wounds, bruises, lameness, sickness and disorder, to the damage, etc.¹⁵²

(Maryland)

For that the defendant is a municipal corporation and is bound to construct, keep in repair and regulate the public highways, roads, bridges, streets and alleys of county, so as to be safe for persons and teams traveling thereon; and that one of the public highways, roads, streets and alleys of county aforesaid, namely (which connects avenue with) at or near the corner of was imperfectly and defectively constructed by said defendant and was negligently suffered to be and remain out of repair, and unsafe for travel, in that the defendant had or left a steep and dangerous embankment or abutment over a large culvert under said highway without guards, railings or safe-guards, to provide against the dangers ensuing from, or which might reasonably ensue from the ordinary and reasonable use of said highway; also, in that the defendant allowed and permitted the sides of said highway to become grown up with vegetation and foliage and bushes and vines, so that they obscured and cut off the view of said culvert and steep and dangerous embankment or abutment or declivity from one lawfully passing on said highway and particularly from the said, while she was then and there lawfully on said highway; and it was negligently suffered by the defendant to remain in such condition; in consequence of which, while the said plaintiff was lawfully driving upon said highway, and while the said plaintiff was using due care, the said plaintiff was precipitated over an embankment of said highway to a depth of ten or twelve feet, and was thereby hurt and injured and damaged externally and internally and seriously and permanently, and two of her ribs were fractured, and one of her lungs was punctured, and she was otherwise seriously and permanently damaged and injured.

And the plaintiff claims therefore dollars.

¹⁵² Nagle v. Wakey, 161 Ill. 387, 389 (1896).

1506 Bridge, railroad; "traveler," Narr. (Ill.)

For that whereas the plaintiff alleges that in the lifetime of the said deceased, prior to and on, to wit, the day of, 19.., the defendant was engaged in the general business of a structural iron contractor and as such was then and there constructing a certain railroad bridge across the river from or near the town of, in the state of Illinois, to the side of said river, and it had then and there in its employ, engaged in said work, a large number of men, among them the deceased, who, the plaintiff alleges, was then and there a structural iron worker, and as such earned, to wit, dollars per day.

And the plaintiff further alleges that the defendant had then and there upon the falsework in the state of Illinois used in the construction of said bridge, and at a great distance above the ground, a certain movable engine or car, called a "traveler," by means of which the iron and other material used in the construction of said bridge was raised up to the point where it was to be used; that at the time and place aforesaid the condition of the weather indicated that a high wind was likely and liable to soon be blowing, and that in the event of such a high wind blowing, if said "traveler" was not properly and securely fastened, as it was not at that time, it was liable to and there was great danger of its starting to run along and upon and falling from said falsework, and if it should thus start to run along and upon and fall from said falsework, it was likely and liable to injure or kill the deceased, or other of the defendant's servants; all of which facts, the plaintiff alleges, the defendant, through its foreman then and there in charge of said work, and who was not a fellow-servant of deceased, knew, or by the exercise of ordinary care in that behalf would have known; and that by reason of the premises, it was then and there the duty of the defendant, through its said foreman, to have exercised ordinary care toward so securing or fastening said "traveler" as to prevent it from starting and running upon and falling from said falsework as aforesaid: but that the defendant, through its said foreman, not regarding its said duty and in utter violation thereof, then and there negligently failed and neglected to so fasten and secure said "traveler," and therein wholly failed and made default, of which failure and default and of the danger to which he was thereby exposed the deceased, through no want of ordinary care upon his part, did not know; and that as a direct result and in consequence of the defendant's said failure and default, and of a high wind which plaintiff alleges shortly afterwards started to blow, said "traveler" then and there started to run upon and along and fell from said falsework a great distance to the ground, and

it then and there struck and knocked deceased, who, the plaintiff alleges, was then and there in the discharge of his duty and exercising ordinary care and caution for his own safety, working upon or about said falsework, a great distance above the ground, and the deceased thereby then and there sustained such serious bodily injuries that he died as a result thereof a short time afterwards.

And the plaintiff alleges that the deceased left him surviving his mother, and brothers
 his only next of kin, all of whom are still living and to whose support and otherwise the deceased was accustomed to and would have continued to contribute large sums of money, and that by reason of the death of the deceased his estate has been damaged to the extent of dollars. To the damage, etc.

1507 Bridge, repair, Narr. (Mich.)

For that whereas, before and at the time of the grievances hereinafter complained of, the company, defendant herein, was a corporation duly incorporated and doing business under the laws of this state providing for the incorporation of plank road companies, and was operating and controlling a public highway from the city of through the townships of and in said county, which was open to and used by the traveling public, and upon which the said defendant had erected toll gates and exacted and collected toll from persons traveling thereon, as authorized by the charter of its incorporation. And at the time hereinafter complained of the said plaintiff was lawfully traveling by horse and buggy on said highway or toll road, and on a part thereof over which the said defendant collected toll. And it became and was the duty of the said defendant to keep and maintain said highway or toll road in a good condition of repair, and safe for travelers by night as well as by day.

Yet, the said defendant neglected its duty in this respect and did not maintain said highway in good repair, but suffered the same to become and remain in a bad condition and unsafe and dangerous to travelers thereon. That said highway or toll road runs in a northwesterly direction from the said city of and said defendant maintains a toll gate thereon near the boundary line between the said city of
 and the township of That a short distance northwesterly along said highway from said toll gate a deep ravine crosses said highway or toll road which is at different points from .. to .. feet in depth below the level of said roadway, and the said defendant constructed a bridge for use of travelers over said ravine about to feet in length on line of travel and about

..... feet wide, and erected railings on each side of the traveled way thereon to protect travelers from accidentally, either from darkness or other causes, getting off the ends of said bridge and being precipitated in the deep ravine, and such railings were necessary to make said highway or toll road in a good condition of repair at that point.

Plaintiff alleges that, for a long time prior to the accident hereinafter set forth, to wit, several years, the said defendant had allowed said railings to rot away and break down to topple over into said ravine, and had allowed said bridge to remain without any railings or protection of any kind to travelers, and by reason of the want of said railings, and the neglect of said defendant to maintain the same the said highway or toll road became and was allowed to remain in a dangerous and unsafe condition for public travel, and the same was condemned by the highway commission of as unsafe and dangerous and notice thereof served upon said defendant, and with full knowledge of the dangerous and unsafe condition and after receiving notice to repair the same the said defendant neglected its duties and failed and neglected to repair the same.

And on, to wit, the day of, 19.., at about the hour of o'clock in the evening the plaintiff was driving along said highway or toll road coming to the city of, with a horse and buggy and a friend seated in the buggy with him, and while in the exercise of all care on his part at all times, and owing to the darkness of the night and the darkness of the place where said bridge is located, while the wheels of plaintiff's buggy landed on the first plank, some of the planks of said bridge further on were considerably shorter and on the wheels coming to the short plank they dropped over the east end of the bridge and plaintiff and his companion were precipitated into the ravine a depth of upwards of feet falling upon logs and timbers of various kinds seriously and permanently injuring plaintiff. That plaintiff at the time of receiving said injuries was years of age and in good health, and capable of earning \$..... to \$...... a month. That by said accident he suffered injury in the muscles, tendons, ligaments, joints and blood vessels of his arms, legs and all parts of his body; that his spine has been seriously injured, and his whole nervous system seriously damaged, the serious effects thereof being indicated at the present time by loss of strength, great weakness in the back and spinal column, injury to the joint of his right knee, and the disordered condition of his liver, kidneys and intestines.

Plaintiff alleges that after receiving said injuries he secured the services of reputable physicians, and has been to the hospital and submitted to operations, and he is advised by his physicians that his injuries are permanent and he alleges the

fact to be that he will be crippled and permanently injured during the balance of his life and will be prevented from earning a livelihood. That he has suffered great pain and will continue to suffer great pain. That he has been unable since said injuries to perform any kind of labor or work. That he has expended upwards of dollars in trying to be cured of said injuries and will be compelled to spend large sums of money in the future.

And plaintiff alleges that the injuries received by him was solely the result of the fault and neglect of the said defendant, and by reason of the premises he has suffered great damages, to wit, in the sum of dollars. Therefore he brings suit.

1508 Bridge, spanned partly, Narr. (Miss.)

That the defendant is a municipal corporation, organized and existing under the laws of the state of Mississippi and located and situated within in said state. That under and by virtue of its charter, derived from sundry acts of the legislature of the state of Mississippi incorporating said municipality, said municipal corporation is given and granted the right and power to lay out, open, and work and maintain all necessary and proper streets, avenues and thoroughfares therein, and by virtue of its said charter is given the exclusive control and jurisdiction of said streets, avenues, thoroughfares and highways located within the territorial corporate limits thereof. That among other streets and avenues located within said municipality, laid out, opened, worked and maintained by it, pursuant to the authority aforesaid, is what is known as street, said street traversing the portion of said city and running in a and direction. That crossing said street from to at a point between what is known as and, being intersecting highways within said city with the said street is a ditch or ravine from feet deep and from feet wide, and that said municipality erected or caused to be erected over the same a bridge in said said bridge being constructed of wooden material and the public invited to pass thereover in the use of said street.

That it became and was the duty of said defendant to maintain said bridge and street in a safe and suitable condition and to so work, control and maintain the same as that persons using said street would do so with safety. But plaintiff avers that notwithstanding its duty in the premises, said defendant negligently failed in this: that the bridge was so constructed that the same did not span said ditch for the

entire width of the street, as it should have done; that the said bridge was not provided with guard rails and lacked from feet on the end thereof, of reaching the line of said street, as it should have done; that said bridge being thus constructed, left a part of said ditch or ravine exposed and unspanned and unprotected in said street, a distance of feet in length, from to feet in width and from to feet in depth, thereby rendering the same dangerous to pedestrians and travelers lawfully using said street.

That on or about the day of, 19.., the said defendant, through its certain duly authorized servants, agents or employees, whose duty it was to gather from the streets, avenues and alleys of said city, trash, debris and refuse as the same should be found therein, remove the same from said city by wagons and carts, in the performance of such duties carelessly and negligently placed on the margin of the lines of said street, at a point some to feet west of said ditch two piles of trash consisting of paper, barrel staves, parts of boxes, tin cans, and other like refuse and thrown away material; the said trash piles being so placed on the sides of said street, as that the same would likely produce and did produce fright in ordinarily gentle animals being driven by said point.

That on the said day of, 19.., the plaintiff while driving an ordinarily gentle and tractable horse hitched to a buggy and while she and her mother were riding, in going from the home of a relative to the home of plaintiff, on and along said street, and at a time when the animal she was driving was under perfect control, and while plaintiff was exercising due care and caution in driving said animal, when they had reached a point in said street when the buggy in which they were riding was upon the said bridge, the animal became suddenly and greatly frightened at the trash piles hereinbefore referred to, and became momentarily uncontrollable and was caused thereby to back the buggy in which plaintiff and her mother were riding, off of the end of said bridge, precipitating the same into the ditch below. That in so falling, the buggy and the horse attached thereto, together with the plaintiff were thrown into said ditch in a heap. That in said fall the plaintiff sustained many physical bruises and wounds on both of her arms and in her left leg, about the knee, ankle and thigh joints, and also suffered certain serious internal injuries. That plaintiff's health was bad, and that the shock sustained from the fright of her said experience, as also from the additional violence sustained in her body by reason of her fall, completely prostrated the plaintiff, from which she was caused to be con-

fined to her bed for many days, and to require constant attention and attendance of medical skill and treatment.

The plaintiff avers that defendant was careless and negligent in the construction of said bridge by failing to build the same so that it should span said ditch for the entire width of said street. That it was also negligent by failing to provide guard rails at the end of said bridge, and that it was also negligent by permitting said open ditch to remain uncovered in any part of said street, and especially in the manner as hereinbefore set out. That said defendant was negligent by piling, or causing said piles of trash to be placed on the sides of said street in the manner hereinbefore set out. And plaintiff avers that by reason of said negligent acts of said defendant, the plaintiff was caused to suffer the injuries hereinbefore described; and that on account of its said negligence in the premises, that the said defendant became and is liable to pay to the plaintiff all such damages as she has sustained in consequence thereof.

The plaintiff avers that by reason of the physical pain and mental anguish suffered by her in consequence of the many bruises, wounds and injuries inflicted upon her person and by reason of the physical and serious sickness of plaintiff resulting therefrom that her general health has been seriously and permanently impaired and that in consequence thereof and in consequence of all of said injuries that plaintiff has been greatly damaged, to wit, in the sum of dollars.

1509 Bridge-tender's negligence, action

A city is liable for the negligence of its bridge-tender who manages its bridge.¹⁵³

1510 Careless driving; minor injured, Narr. (D. C.)

The plaintiff,, avers that, on, to wit, the day of, the supreme court of the District of Columbia holding a probate court appointed him administrator of the estate of, deceased; that he has duly qualified as such; that on the day of, letters of administration were issued to him by said court.

Plaintiff further avers that the defendant,, is a corporation and was, on, to wit, the day of 19.., engaged in business in the District of Columbia in transferring baggage to and from the various depots in said District of Columbia by means of heavy wagons drawn

¹⁵³ Lehigh Valley Transportation Co. v. Chicago, 237 Ill. 581, 582, 583 (1909).

by a horse or horses; that in the course of its said business, the defendant transferred baggage to and from the depot at the corner of avenue and street northwest in said district; that, on, to wit, the day of, 19., the deceased, then an infant of.... years of age was lawfully upon street, north near its intersection with street, west in the city of in the District of Columbia and was engaged in play with a number of his companions when a heavy wagon of the defendant corporation drawn by a horse or horses, and in charge of the agents, servants and employees of the said defendant corporation, came rapidly from the west along street, to wit street; that it then and there became the duty of the defendant, its agents, servants and employees to use ordinary skill and care in driving, managing and controlling the horse or horses attached to said wagon, but disregarding said duty, said defendant, its agents, servants and employees controlled, managed and drove the wagon and horse or horses of the defendant so carelessly, negligently and unskillfully, and were so negligent, inattentive and regardless of their duties, that the said wagon of the defendant corporation was driven upon and over the said, now deceased; that he was thereby mortally wounded and crushed and was removed to the hospital and died within a few hours; that his death was in consequence of the violence, wounds and bruises so received by him, the said and the result of being run over by the wagon of the defendant corporation, through the negligence, carelessness, mismanagement, unskillfulness and lack of attention of the agents of the defendant who were in charge of the same; and that the said on, to wit, the day of, 19., in the city of, in the District of Columbia then and there died.

And the plaintiff avers that the death of the said decedent of the said plaintiff, was under such circumstances and in such manner that if death had not resulted, the said would, as an infant, by his next friend, have had a right of action against the defendant corporation on account of the carelessness, negligence, unskillfulness, mismanagement and lack of attention of the servants of said defendant corporation for the injury done to him at the time, place and in the manner indicated; but that as death resulted to the said, the said decedent of said plaintiff by reason of the said negligence, unskillfulness, recklessness, carelessness and inattention of the servants of the said defendant corporation, the said plaintiff, as his administrator, became entitled to sue for the damages sustained by the next of kin of the deceased, through the wrongful act of said defendant corporation, its servants and agents, under and by virtue of section 1301 of the Code of

the District of Columbia; that said decedent left surviving him as his next of kin, his father, the plaintiff, and an infant brother; that the said was a strong healthy child and that his father lost divers great gains and profits which he might, could and would have gained from the said in his life time, but for his untimely decease on account of the negligence, carelessness, and wrongful acts of said defendant corporation and its servants; and that the next of kin of said deceased were damaged to the extent of dollars. Wherefore, etc.

(Illinois)

For that whereas the defendant,, a corporation, before and at the time of the committing of the grievances hereinafter mentioned, was in the brewing business, and as such was the owner of a certain vehicle or brewery wagon by it used and employed in hauling, carrying and delivering beer to divers customers of the said defendant at divers places in the city of, county and state aforesaid, and being such owner and in control of the said vehicle or brewery wagon, or other conveyance, it, the defendant, on, to wit, the day of, 1..., at, in the county and state aforesaid, by and through the negligence and carelessness of the said defendant by its servant who was then and there at said time driving said conveyance with a team of horses of the said defendant thereto attached, along and upon a certain street or public highway in the city of, county and state aforesaid, known as, to wit, street, between two other public streets in the city of, and state aforesaid known as, to wit, and streets, then and there so negligently, wilfully and maliciously managed, and drove said team with said wagon or vehicle attached that K, the deceased, who was a mere boy of the age of, to wit, years, while on his way to school and while crossing the said highway known as, to wit, street at the place aforesaid with all due care and diligence, as he had the right to do, was by the negligence and carelessness of the defendant, by its then servant, run into with the vehicle and team of horses aforesaid, struck, thrown and knocked down with great force and violence to and upon the ground there and passing over his body, and was thereby then and there killed.

2. That it also then and there became and was the duty of the said defendant to employ competent, proper and capable servants in the carrying on of its business and particularly in the driving of said team and wagon as aforesaid. Yet, the defendant, not regarding its duty in that behalf, did not employ careful, competent, proper and suitable persons in its business as aforesaid, but carelessly, wilfully and negligently employed

and permitted an incompetent person to drive one of its said wagons and teams on the day aforesaid at the place aforesaid, and while the said K, who was a boy of the age of, to wit, years, who, while using all due care and diligence for his own safety and while on his way to school, in attempting to cross the said street known as, to wit, street, was by reason of the carelessness and negligence of the said defendant, by its said servant in that behalf, then and there run into and struck with great force and violence by the said vehicle or wagon so driven by the servant of the said defendant, and thereby the said K was then and there thrown with great force and violence to and upon the ground there, and was thereby then and there killed.

And the plaintiff avers that the said K left him surviving J K, his father, R K, his mother, S K, and F K, his brothers, and A K, his sister, and next of kin, who are still living and who were deprived of his services and their support and education, to the damage of the plaintiff as administrator as aforesaid of dollars, and therefore he brings his suit, etc.

And the plaintiff brings into court here the letters of administration to him granted by the probate court of the county aforesaid, which gives sufficient evidence to the court here of the grant of administration of the said estate to the plaintiff, etc.

.....
Administrator of the
estate of
deceased.

b

For that whereas heretofore, on, to wit,, 19..., at the city of, to wit, in the said county of, the defendant was the owner of, to wit, two certain horses and a certain wagon; and whereas the defendant then and there had placed said horses with said wagon in charge of a certain other person then and there being a servant of defendant, which said person as such servant, while acting within the scope of his said employment and in the transaction of defendant's business, was then and there negligently and unlawfully driving said horses and wagon along a certain public street, to wit, street, and within the corporate limits of the said city of at a much greater rate of speed than six miles an hour, to wit, at the unlawful rate of fifteen miles an hour, contrary to the form and terms of a certain ordinance of the said city of then and still in force and legal effect, wherein and whereby it was then and there provided, among other things, substantially in the words following, to wit: "No person shall ride or drive any horse or horses or

other animals in the city of with greater speed than at the rate of six miles an hour under a penalty of not more than ten dollars for each offense to be recovered from the owner or driver thereof severally and respectively;" and therein the defendant, by its said servant wholly failed and made default; and thereby, by means of the said several premises and in consequence of which said default and by reason of the negligence and carelessness of the defendant by its said servant, the said horses and wagon or some one or several thereof then and there ran and struck with great force and violence upon and against the plaintiff, then being an infant of tender years, to wit, of the age of six years, or thereabout, and while plaintiff then was upon said public street at or near the intersection of a certain other public street, to wit, avenue, as he lawfully might, and while he then and there was in the exercise of as much care and caution as was usual and could be reasonably expected of an infant of his age, intelligence and knowledge under the same or similar circumstances, then and there as aforesaid, and thereby injured the plaintiff both internally and externally, whereby he was rendered permanently sick, sore, wounded, crippled and disordered, and received a severe nervous shock and concussion of the brain and spine, and thereby the plaintiff's internal organs and his liver, kidneys, bladder and heart were greatly and permanently affected and rendered incapable of properly performing their normal functions and were rendered diseased, and thereby, to wit, seven of the plaintiff's ribs were broken and fractured and dislocated, and divers other of the plaintiff's ribs were thereby greatly and permanently injured, and thereby also, by reason of the premises, divers of the other bones of the plaintiff's body and limbs were dislocated, strained, sprained, broken and otherwise injured, and the plaintiff suffered from sprains, lacerations, tearing and ruptures of divers other parts of his body; and the plaintiff thereby suffered greatly from loss of blood, and thereby the plaintiff's body was rendered subject to divers swellings, and the plaintiff was rendered subject to spitting of blood and passing of blood in his urine, and thereby his private parts and organs of reproduction were greatly and permanently impaired and injured, and the plaintiff will be rendered unable to work or earn a living, and will be put to great expense for medicines, nursing and medical attendance in the future; also by reason of the premises, the plaintiff says that he has been and is otherwise greatly and permanently injured and damaged, to wit, at said county. Wherefore, etc.

1511 Careless running of street car; laborer injured, Narr. (Mich.)

For that, at the present time and on, to wit,
, 19.., and for a long time, to wit, months,

prior thereto, said defendant, the company, owned and operated a certain street railway along and upon certain streets in the city of, county of and state of Michigan, and more particularly along and upon the streets in the city of, known as avenue and street from the intersection of said street with street to the point where said avenue joins said street, and from thence west on said avenue to, to wit, street, upon which said railway said defendant was then and there controlling and operating divers electric motor street cars.

On said date, to wit,, 19.., plaintiff, a man of the age of, to wit, years, was in the employ of the city of, as a street sweeper, and at about o'clock in the of said day, was working on the track of said defendant at a point on avenue, a distance of, to wit, feet west of the point where said avenue intersects street. Plaintiff was working on said defendant's track as aforesaid, with his back towards defendant's car which was approaching from the west, as hereinafter set forth, for a period of, to wit, minutes, and was in plain sight of the motorman of said car as it approached plaintiff, for a distance of, to wit, feet. Defendant's car, number, to wit,, then and there approached plaintiff from the west at a speed of, to wit miles per hour. There were then and there upon avenue and street, which were then and there paved with brick, many wagons and other vehicles which made such a noise as to drown the sound of said car as it approached plaintiff.

It thereupon became and was then and there the duty of said defendant to run its said car in a careful and cautious manner with due regard to the rights of plaintiff, who was lawfully upon the track;

And it became and was then and there the duty of the defendant to run its said car at a reasonably safe rate of speed;

And it became and was then and there the duty of the defendant by its motorman, to keep a sharp lookout ahead of said car, so that when it became, or ought to have become, apparent to said motorman that plaintiff was on the track of said defendant in a position of danger, and did not know of the approaching car and from plaintiff's actions that he did not intend to remove himself from the track before said car would reach him, said motorman could control and stop his car at any time to avert an injury;

And it became and was then and there the duty of said defendant, by its motorman, when said motorman saw, or ought to have seen, plaintiff on the track in a position of danger, to check the speed of said car and bring it under

such control that it could be brought to a stop before reaching the point where plaintiff was on the track in a position of danger, as aforesaid;

And it became and was then and there the duty of said defendant to give plaintiff warning by the sounding of a gong, or otherwise, of the approach of said car to the point where plaintiff was on the track, as aforesaid, and to continue such warning until plaintiff should remove himself from the path of said approaching car;

And it became and was the duty of defendant by its motorman, when said motorman saw, or ought to have seen, that plaintiff was on the track in a position of danger and that plaintiff did not intend to get off the track, to use every effort to stop said car;

And especially did the said defendant owe to the said plaintiff the duties above set forth, in view and by reason of the fact that there were then and there many heavy wagons and other vehicles, the noise of which made it impossible for plaintiff to hear the sound of said car as it approached, and that there were then and there many other pedestrians and workmen on the street.

After said car struck plaintiff, throwing him to the pavement in such a position that his legs were under the fender of said car, it became and was then and there the duty of said defendant to immediately stop said car and to give aid, assistance and attention to plaintiff and to hold said car stationary, and to render assistance in extricating plaintiff from under the fender of said car.

Yet the said defendant then and there wantonly, recklessly and wilfully disregarded its duties as above set forth, in the following particulars, to wit:

Defendant failed to run its said car in a careful and cautious manner with due regard to the rights of plaintiff.

Defendant did not then and there run its said car at a reasonably safe rate of speed, but on the contrary, ran said car at an unsafe and unreasonable rate of speed when approaching plaintiff, and especially was the speed of said car unsafe and unreasonable in view and by reason of the fact that there were then and there many wagons and other vehicles, the noise of which drowned the sound of said car as it approached plaintiff, and also many other pedestrians and workmen.

And defendant further wantonly, recklessly and wilfully disregarded its duties, in that its motorman who was operating said car did not keep a sharp lookout ahead of said car as it was approaching plaintiff, as aforesaid, and did not have said car under control so that it could be stopped in time to avert an injury to plaintiff, when it became, or ought to have become, apparent to said motorman that plaintiff was in a position of danger and did not know of the approach of said car, and said motorman did not have said car under control so that it

could be stopped in time to avert an injury to plaintiff when it became or ought to have become, apparent to said motorman, from the actions of plaintiff, that he, the said plaintiff, did not intend to remove himself from the path of said approaching car before said car would reach him.

Defendant further wantonly, recklessly and wilfully disregarded its duties by not checking the speed of said car and bringing it under control, so that it could be stopped before reaching plaintiff, when the motorman of said car saw, or ought to have seen, plaintiff on defendant's track in a position of danger.

Defendant further wantonly, recklessly and wilfully disregarded its duty by failing to give plaintiff warning by the sounding of a gong or otherwise, when said car was approaching plaintiff as he was working on the track of said defendant with his back to said car and in plain sight of the motorman of said car, as aforesaid.

Defendant further wantonly, recklessly and wilfully disregarded its duty by failing to use every effort to stop said car when the motorman saw or ought to have seen that plaintiff was on the track in a position of danger and that plaintiff did not intend to get off the track.

Defendant further wantonly, recklessly and wilfully disregarded its duty by continuing to run its said car forward a distance of, to wit, feet, after said car had struck plaintiff and knocked him to the pavement, as aforesaid, dragging plaintiff for said distance along and over the rough pavement.

Defendant further wantonly, recklessly and wilfully disregarded its duties by not holding said car stationary after it had stopped running forward, as aforesaid, and by reversing said car and running the same backward a distance of, to wit, feet, again dragging plaintiff for said distance, along and over the rough pavement.

Then and there and thereby, and by reason of the premises and while plaintiff was in the exercise of due care, defendant ran and propelled its said car against, over and upon plaintiff, dragging him forward along and over the rough pavement, a distance of, to wit, feet, and then as said car was reversed again dragging plaintiff along and over the rough pavement, a distance of, to wit, feet.

And then and there and thereby, and by reason of the running and propelling of said car against, over and upon plaintiff, and by reason of the dragging of plaintiff forward a distance of, to wit, feet, and again backward, a distance of, to wit, feet, plaintiff was thrown violently to the pavement, his right collar bone was fractured, three or more large wounds were made in his head, and said wounds were of such a serious nature that it became necessary for them to be sewed up by a surgeon, his body, arms and legs were wounded,

bruised and lacerated and the drums of his ears were injured so that ever since, 19.., he has been gradually growing deaf; plaintiff was also injured internally, and as a result of the shock, his nervous system was wrecked, all of which injuries are permanent, and from the effect of which plaintiff has suffered great mental and bodily pain as a result of such injuries, and will continue to suffer great mental and bodily pain, as a result of such injuries, during the rest of his natural life, and he has become crippled, lame and disabled, and will be crippled, lamed and disabled during the rest of his natural life; and plaintiff, except for the injuries aforesaid, would have been capable of earning large sums of money in the future, to wit, (\$.....) dollars, per annum, but by reason of the premises, he has become incapacitated from doing any labor and will continue to be so incapacitated from doing any labor during the rest of his natural life, and he has been permanently deprived of the ability to earn a livelihood for himself and family; and plaintiff has been compelled to expend and become liable for large sums of money, to wit, (\$.....) dollars, for medical attendance, nursing and care, and for medicines, and will in the future be required to expend and become liable for large sums of money therefor, on account of the injuries aforesaid.

And plaintiff was without negligence with respect to the cause of his said injuries.

All to plaintiff's damage of (\$.....) dollars, and therefore he brings suit.

1512 Careless running of street car; pedestrian injured, Narr. (Ill.)

For that whereas, heretofore, on, to wit, the day of, 19.., the defendant,, was possessed of and owned, operated, controlled and used a certain street railway propelled by means of an underground cable over, along and upon a certain street known as avenue, in said city of and county and state aforesaid, and the defendant on said, to wit, the day of, 19.., was possessed of and using and operating a certain train of cars and the said train of cars was then and there under the care and management of divers then servants of the defendant, who were then and there, to wit, on said day, driving and propelling said train of cars upon and along the said street, known as avenue; and while the said plaintiff, who was then and there, on, to wit, said day of, 19.., with all due care and diligence for his own

safety walking along and upon the said street, avenue, in said city of, which said street was then and there a public highway, the defendant then and there by its servants so carelessly and improperly managed said train of cars that by and through the negligence and improper conduct of the defendant the said was then and there thrown with great force and violence upon the ground by said train of cars and was then and there struck by said train of cars and greatly bruised and injured.

And plaintiff avers that by reason of the premises, he then and there became and was sick, sore, lame and disordered, and divers of his bones became broken and injured and divers of his muscles, tendons and sinews became wrenched, bruised, injured and contused, and the said plaintiff suffered a severe and permanent weakening, disorder, and displacement, and thereby the plaintiff suffered great pain and anguish and will in the future during his natural life thus suffer, and thereby the plaintiff became greatly and permanently lame and crippled and thereby his, the plaintiff's, viscera and his internal organs were greatly and permanently disordered, weakened and injured, and thereby the plaintiff became necessarily indebted for a large sum of money in and about endeavoring to be cured of his various wounds and ailments occasioned as aforesaid, and his ability to earn a living and pursue his regular and ordinary vocation was and has been greatly and permanently injured. Wherefore, etc.

COLLISIONS

1513 Automobile and street car, Narr. (Ill.)

For that whereas on, to wit, the, 19.., at, to wit, the city of, county and state aforesaid, the said, defendant, was in the business of keeping for hire and hiring to the public certain automobiles, and he then and there had possession, charge and control of certain automobiles and had in his employment a certain chauffeur or driver to operate said automobiles, and then and there the said did for a certain compensation hire a certain one of said automobiles, and the chauffeur as his said servant to operate the same, to the plaintiff and other persons, or to certain other persons for her, and then and there the said directed his said servant, the said chauffeur or driver, to operate the said automobile, and then and there while the plaintiff, with other persons, were rightfully and lawfully riding in the said automobile, and while the plaintiff was riding therein, with all due care and caution for her own safety, and while the same was being operated by the said employee of the said as his servant, the said servant so negligently and carelessly ran, managed, controlled and operated

the said automobile upon a certain public street in said city, that then and there and thereby, by and through and by reason of the said negligence, as aforesaid, of the said chauffeur or driver, the said automobile then and there ran against and struck with great force and violence a certain street car, and then and there and thereby the plaintiff was thrown violently from the said automobile to and upon the ground, whereby she then and there sustained severe external and internal injuries to her body, arms, legs and head, all of which injuries are permanent, and thereby she sustained serious internal injuries to her lungs, heart, liver, kidneys, ovaries, uterus, stomach and other organs, and the said injuries have resulted in permanent nervous disorders; and thereby plaintiff's spine and back were greatly injured, all of which injuries are permanent. And by reason of said injuries plaintiff became and was sick, sore, lame and disordered, and so remained for a long space of time, to wit, from thence, hitherto, and so she will remain permanently. And by reason of the said injuries plaintiff has paid out and become liable to pay divers large sums of money, to wit, dollars in and about endeavoring to be cured thereof; and by reason of said injuries plaintiff has been unable to follow her usual occupation and has lost thereby divers large sums of money, to wit, dollars per month since the said injuries.

All to the damage of the plaintiff in the sum of dollars. Wherefore, she brings this suit.

1514 Down grade collision, Narr. (Mich.)

For that whereas, on, to wit, the day of, 19.., and for a long time prior thereto, the said defendant was and still is a corporation organized and doing business under the laws of the state of Michigan, and was and still is the owner and proprietor of a street railway system in the city of, Michigan, and an interurban electric railway between and, Michigan, and was operating upon the streets of said city of, to wit, avenue and avenue, a line of street cars for the carriage of passengers for hire, and said defendant was then and there a common carrier of passengers for hire.

And for that whereas, heretofore, on the day of, 19.., the said plaintiff, at the special instance and invitation of the defendant, did enter upon and into one of its cars for the purpose of becoming a passenger thereon, and for the purpose of being conveyed for hire and reward to said defendant as a passenger in its said car from the east end of its track on avenue, in said city to a point on its line on avenue south, and the said defendant

then and there received said plaintiff as such passenger to so be carried as aforesaid.

And thereupon it became and was the duty of said defendant, with due and proper care to convey and carry said plaintiff from said first mentioned point on its said line to said second mentioned point; and particularly it became and was its duty to provide reliable, skillful and careful employees, who would run and operate said car in a careful, proper and safe manner; and it became and was its duty to see to it that said car was run and operated in a careful and safe manner and with reasonable and proper regard for the safety of said plaintiff; and it became and was the duty of the said motorman on said car to remain at all times at his proper and usual station on the said car when the same was in motion in order that he might properly control the same and reverse the current by which the said car was run and operate the brakes as occasion might demand.

Yet, the said defendant, not regarding its duties in that behalf, did not use due and proper care to convey and carry said plaintiff from the said first mentioned point on its said line to said second point; and did not provide reliable, skillful and careful employees who would run and operate said car in a careful, proper and safe manner and with reasonable and proper regard for the safety of said plaintiff; and the motorman on said car did not remain at all times at the proper and usual station on the said car when the same was in motion; but the said motorman unnecessarily, negligently, carelessly and without due and proper regard for the safety of plaintiff, abandoned his proper and usual station on said car, and when the same was in motion and running at a high rate of speed took hold of the handle or support on the side of the vestibule of said car, intended for the use of passengers and employees in getting on and off said car, and attempted to swing himself out of said vestibule and around and in front thereof without either stopping said car or providing anyone to take his place at his proper and usual station and without in any way providing for the control of said car and while so doing fell from said car to the ground, and said car was thereby left uncontrolled, and with no one to check or reverse the current by which said car was propelled or apply the brakes as occasion might demand, or in any way to control said car.

2. And it also became and was the duty of said defendant to provide reliable, skillful and careful employees who would run and operate said car in a careful, proper and safe manner and to see to it that said car was run and operated in a careful, proper and safe manner and with reasonable and proper regard for the safety of said plaintiff; and it became and was the duty of the conductor of said car to exercise all due care and caution in the operation and conduct of said car, and to see that the same was at all times kept under proper and due

control, and if for any reason the motorman failed to remain at his proper and usual station on said car, and to maintain at all times proper watchfulness and control over the same, and if said car should for any reason not be properly operated and controlled by the motorman, to use all means within his power to bring said car within control, and to see that it was safely and properly operated.

Yet, the said defendant, not regarding its duties in that behalf, did not use due and proper care to convey and carry said plaintiff as aforesaid, and to provide skillful, reliable and careful employees who would run and operate said car in a careful, proper and safe manner; and it did not see to it that said car was run and operated in a careful, proper and safe manner, and with reasonable and proper regard for the safety of said plaintiff; and the conductor of said car, the motorman as aforesaid having abandoned his usual and proper station on said car and having failed to keep and maintain said car under proper control, negligently, carelessly and unskillfully, did not do all that was within his power to keep and bring said car under proper control; and, although said car, as aforesaid, in passing down a grade in avenue, attained a high and dangerous rate of speed, the said conductor did not reverse or in any way check or break the current by which said car was propelled and did not set the brakes upon the rear of said car as he might and ought to have done, and said car was thereby left uncontrolled.

3. And particularly because it was the duty of said defendant to provide a safe and suitable car in which to carry plaintiff.

Yet, the said defendant, not regarding its duty in that behalf, did not use due and proper care to convey and carry said plaintiff as aforesaid, but negligently and carelessly provided a car that was unsafe and dangerous in this, to wit, that one of the handles or supports provided for the purpose of being taken hold of by passengers in getting on and off said car, and by employees in the operation of said car to support themselves, was weak, broken and unsafe so that when the said defendant's motorman, whose duty it was to control the speed of said car, and to apply the brakes as occasion might demand, took hold of said handle or support, it gave way and caused said motorman to fall off from said car to the ground, and said car was thereby left uncontrolled, and with no one to check or reverse the current by which said car was propelled or apply the brakes as occasion might demand, or in any way to control said car; and by reason thereof said car in going down grade in said avenue attained a high and dangerous rate of speed and ran off the track and ran violently into a house standing by the side of avenue, and threw plaintiff with great force and violence against the back and end of one of the seats in said car so that said plaintiff, with-

out any fault or neglect on his part, was greatly hurt, bruised, and injured, and made sore, sick, lame and disordered, and had three ribs broken, and his liver and spleen injured, displaced and caused to become inflamed and enlarged, and his stomach and bowels bruised, injured, torn and lacerated, from all of which he has ever since suffered and still suffers great bodily and mental pain and anxiety, and has ever since been unable to follow his usual occupation or employment or any occupation or employment whatever, whereby he has been deprived of great gains which he would otherwise have had, and has been put to great expense for surgical and medical attendance, nursing and medicines, and has been permanently injured, his constitution weakened, and his health impaired, so that he will in the future be deprived of great gains, and will suffer great bodily and mental pain, and be further put to great expense for medical and surgical attendance, nursing and medicines, to his damage of dollars, and therefore he brings suit.

1515 Elevated trains, Narr. (Ill.)

For that whereas, heretofore, on, to wit, on the day of, 19.., the defendant was a corporation and duly organized, existing and doing business under and by virtue of the laws of the state of Illinois, and was then and there the owner of, in possession, control and management of a certain line of elevated railroad in the county aforesaid, which ran and extended over, along and upon a certain public street and highway in said county known as and called L street, which said L street then and there intersected and abutted upon divers other public streets and highways, and particularly then and there intersected and abutted upon a certain other public street and highway, known as and called W avenue; upon which said tracks the defendant then and there placed, moved, operated and ran divers cars and trains of cars, propelled, moved and driven by means of electricity, and in addition to said line of elevated railroad in said L street, the defendant then and there by license, contract, lease, agreement, permission, consent and sufferance of a certain other corporation organized, existing and doing business under and by virtue of the laws of the state of, known as and called U, then and there placed, moved, operated, managed and drove its said cars and trains of cars on divers other elevated tracks belonging to and used by said U upon other of said public streets and highways, more particularly said W avenue, and a certain other public street or highway, known as and called V street, in said county, said L street and said V street then and there each running and extending through said city and county in an easterly and westerly direction and

lying parallel to each other, and the said W avenue then and there running and extending in a northerly and southerly direction through a portion of said city, and intersecting, crossing or abutting upon said L street and said V street at nearly right angles; and the said defendant was then and there engaged in the business of carrying passengers to and from certain stations upon said line of its tracks to certain other stations upon its said line of tracks, and to certain stations upon the line of tracks owned by and in possession of said U. All of which the said defendant did for hire and reward, and was then and there a common carrier of persons for hire.

And the plaintiff avers that upon, to wit, the said day of, 19.., at a point on said defendant's line of elevated railroad, to wit, at a certain station known as C avenue, in A, in the said county, the defendant received the plaintiff into one of its said cars which was then and there one of a train of cars managed, controlled, operated and possessed by the defendant, as aforesaid, and for reward and compensation then and there paid by the plaintiff to the defendant, the plaintiff was to be safely carried and conveyed as a passenger along and upon the defendant's said line of tracks to the tracks of the said U, and thence along and upon the tracks of said U to his destination at a station of defendant in the vicinity of the intersection of said V street with a certain other public street or highway running northerly and southerly through said city, and known as and called D street.

And the plaintiff avers that by reason of the premises it then and there became and was the duty of the defendant to use the highest degree of care, caution and prudence to safely carry and convey the plaintiff in its said cars along and upon said lines of elevated track to his said place of destination and there deliver the plaintiff uninjured, and to that end and for that purpose to exercise and use the highest degree of care and caution in the control, operation and management of the train in which the plaintiff was riding as such passenger, as also in the control, operation and management of other trains upon the same tracks used by the defendant and which might be running and operating in close proximity to the train in which the said plaintiff was riding as a passenger as aforesaid.

But therein the said defendant wholly failed and made default, and contrary to its duty in that behalf, and when the said car in which the plaintiff was riding, as aforesaid, as a passenger, had arrived at and in the vicinity of where said L street is intersected by a certain other public street and highway in said city of, known as and called A street, in said county, the defendant so carelessly, negligently and imprudently operated, managed and governed the cars and trains which were then and there operating and running upon

said track, that the defendant by its servants and agents in that behalf ran, drove and moved a certain other car or train of cars then and there upon the said track in close proximity to the train and car in which the plaintiff was riding as aforesaid, so that by reason of the carelessness and negligence of the defendant and of the premises, one of defendant's said trains so operated and controlled by it, as aforesaid, then and there collided with great force and violence with, against and upon said car and the train upon which the plaintiff was riding as aforesaid; whereby and by means whereof the plaintiff, who was then and there without fault or negligence on his part and with all due care and caution for his own safety riding as such passenger, was then and there violently struck and hurt, and was then and there violently thrown from his seat in said car in which he was riding as aforesaid, to, upon and against the seats, parts, sides and floor of the said car, and the seats, parts, and sides of said car were then and there with great force and violence hurled and thrown upon the plaintiff; by means whereof he was greatly hurt, bruised, contused and wounded in and about his head, body, limbs, spine and spinal cord; and the plaintiff then and there suffered severe internal and external injuries and lesions, and severe shock to his nervous system, resulting in the impairment of his nervous organization and mental faculties, whereby he has become and is greatly deranged, both mentally and physically, and has been unable to sleep or rest, and has suffered and will continue to suffer mental and physical prostration and distress, and divers bones, tendons and ligaments were then and there strained, sprained, bruised and contused, and he became and was by reason thereof sick, sore, lame and disordered and so remained for a long space of time, to wit, from thence hitherto, which injuries are and will be permanent.

And the plaintiff further avers that by reason of all said premises, he has expended, paid out and become liable for divers large sums of money, to wit, the sum of dollars for doctor's bills, medicine, medical and surgical attendance and nursing, in and about endeavoring to cure himself and to be cured of his wounds, bruises and injuries occasioned as aforesaid.

And the plaintiff further avers that prior to the time of his said injury he was a strong, healthy and robust man, engaged in the business and occupation of a, and in and about such business, and by means thereof, he was able to and did earn large sums of money, to wit, the sum of dollars a month, but that by reason of the injuries received as aforesaid and of the premises the plaintiff has become and is unable to longer perform and carry on his said business. To the damage, etc.

1516 Street car and buggy, Narr. (Ill.)

For that whereas, on, to wit,, 19.., on a certain public highway known as street in the city of county, aforesaid, near a certain other street called street, the plaintiff was rightfully riding in a certain vehicle called a buggy then and there drawn and propelled by a certain horse upon and along said public highway, to wit, street, and the defendant was then and there possessed of and had control of, by its then servants, of a certain street car which was then being drawn westward on street by a team of horses, said horses being then in the possession and under the care of the said defendant by its said servants, who were then and there driving it along and upon certain street car tracks then and there in the possession of the defendant, along said street as aforesaid; and while the plaintiff with all due care and diligence was rightfully riding then and there in said buggy on said street and across said street car tracks, the defendant then and there by its said servants so carelessly, and improperly drove and managed the said horses and said street car that by and through the negligence and improper conduct of the defendant by its servants in that behalf the said street car and horses then and there ran and struck with great force and violence upon and against the plaintiff's buggy in which he was then and there riding; and thereby the plaintiff was then and there, with great force and violence, thrown from said buggy to and upon the ground there; and was thereby then and there greatly bruised, hurt and wounded, his left foot and toes badly crushed and lacerated, the flesh of his left leg torn and lacerated up to the knee, his right leg wrenched, bruised and wounded; his back wrenched, strained and bruised, and his nervous system severely shocked throughout his body; and he became and was sick, sore, lame and disordered, and so remained for a long space of time, to wit, from thence hitherto; during all of which time he, the plaintiff, suffered great pain and was hindered and prevented from attending to and transacting his affairs and business; and he, the plaintiff, was permanently injured and damaged, and the said horse, which he then owned, was badly bruised, hurt and frightened and the harness which he then and there owned torn and shattered, and his said buggy wrenched and damaged; and by means of the premises the plaintiff was forced to and did then and there lay out divers sums of money, amounting to dollars in and about endeavoring to be cured of his said wounds, hurts and bruises occasioned as aforesaid; and the plaintiff was compelled for a long time, to wit, for the space of to abandon and neglect his business as a surgeon and medical practitioner, by means whereof he suffered a great loss of his income, to wit, a loss amounting to

dollars; and also, by the running and striking of the said horses and street car upon and against the plaintiff's buggy as aforesaid, at the time and place in that behalf aforesaid, the said buggy being then of the value of dollars, and whereof the plaintiff was then and there lawfully possessed, was crushed, weakened and broken, and the plaintiff was compelled to pay out a large sum of money, to wit, the sum of dollars in and about repairing the same, and the harness upon said horse, whereof the plaintiff was then and there lawfully possessed, was torn and shattered, and the plaintiff was compelled to pay out a large amount of money, to wit, dollars in and about repairing the same; and the horse, whereof the plaintiff was then and there lawfully possessed, was seriously and permanently injured so that he depreciated in value to the amount of dollars. Wherefore, etc.¹⁵⁴

1517 Street car and fire engine, Narr. (Ill.)

For that in the lifetime of the said B, to wit, on the day of, 19.., in the city of, which city is wholly within county, in the state of Illinois, he was a member of the fire department of said city of, a city organized and existing under the laws of said state and having such a department, and as a part of his duty as such member, was riding to a fire on a certain fire engine then and there being drawn by certain horses, upon and along street, a public highway, in said city, at a certain crossing of said street, and avenue, another public highway in said city, and the defendant was then and there a street railroad company, and also known as a street railway, and as one of the city railway companies and was then and there possessed of, using and operating a certain street railroad extending through a part of said city, and upon and along said avenue over and across said street, and on said avenue for a long distance thereon on both sides of the said crossing, and in said city.

And defendant also then and there possessed a certain electric motor car used by it to carry passengers along and on said avenue by means of an electric current then and there supplied by it through an overhead trolley wire there to an electric motor upon and a part of said car, which said car and the track on which same was, were then and there under the care and management of divers then servants of the defendant, which said car was then and there running upon and along the said avenue near and towards the said crossing.

And thereupon it became and was the duty of the defendant

¹⁵⁴ Chicago West Division Ry. Co.
v. Ingraham, 131 Ill. 659 (1890).

at said city, on, to wit, said day of, 19.., to run and operate said car at a moderate and reasonable rate of speed in approaching and passing over said crossing at night.

Yet, not regarding said duty, but in violation thereof, and while the said B, with all due care and diligence, was then and there riding on said fire engine on and along said street and across the said street railroad and said avenue, the said defendant then and there, by its servants, so negligently, carelessly and improperly ran said car at an immoderate, unreasonable and excessively fast and dangerous rate of speed at night while approaching and passing said thronged crossing; and failed to use the care and prudence in that respect which the safety of those whom said servants in good reason should know are likely to be imperilled by said car being so run, demands should be exercised; and did not, in approaching said crossing, so regulate the speed of said car that collisions with other persons having the right to cross said avenue at said crossing could, by the exercise of ordinary care, be avoided; and said car was then and there run at such a great rate of speed in approaching and passing said crossing as to interfere with the customary use of said avenue and crossing by others of the public with safety.

2. And thereupon it also became and was the duty of the defendant at said city, on, to wit, said day of, 19.., carefully and properly to cause said car to be run under control in approaching and passing over said crossing of said street and avenue, in this, to run said car so that the motorman operating said car is able to keep control of it, so as to stop it within a reasonable distance upon the appearance of danger to others; and to so lessen the speed of said car while same was approaching said crossing, that said car would be under control while passing over on said crossing.

Yet, not regarding said duty, but in violation thereof, and while the said B, with all due care and diligence, was then and there riding on said fire engine on and along said street and across the said street railroad and said avenue, the said defendant then and there by its servants so carelessly, negligently and improperly caused said car to be run not under control in approaching and passing over said crossing, and it did not run said car so that the motorman operating the same would be or was able to keep control of it, so as to stop it within a reasonable distance upon the appearance of danger to others; and it did not so lessen the speed of said car while same was approaching said crossing that said car would be under control while passing over or on said crossing.

3. And thereupon it also became and was the duty of the defendant at said city, on, to wit, said day of, 19.., to carefully and properly drive and manage said car by causing a bell or gong on said car to be rung or sounded just before said car ran upon and on to said crossing, and to keep

said bell or gong constantly sounded while said car approached said crossing.

Yet, not regarding said duty, but in violation thereof, and while the said B, with all due care and diligence, was then and there riding on said fire engine on and along said street and across the said street railroad and said avenue, the said defendant then and there by its servants so negligently, carelessly and improperly drove and managed said car at night, and while it was dark, without causing a bell or gong on said car to be rung or sounded just before said car was run upon and on to said crossing; and it did not keep said bell or gong constantly sounded while said car approached said crossing.

4. And thereupon it also became and was the duty of the defendant at said city, on, to wit, said day of, 19.., to carefully and properly have its servants then and there in charge and management of said car, while the same was approaching said crossing, watch and look out for the approach or passage of fire engines upon said street over said crossing to avoid running said car into the said engine, and to have said servants then and there look to see if said crossing was and would be clear for the passage of said car; and endeavor to ascertain if the track upon said crossing was and would be clear for the passage of said car, and to exercise greater watchfulness and give more attention as to whether the track ahead of said car was clear, while said car was approaching and passing said crossing, than at other places on the route of said car.

Yet, not regarding said duty, but in violation thereof, and while the said B, with all due care and diligence, was then and there riding on said fire engine on and along said street and across the said street railroad and said avenue, the said defendant then and there by its servants then and there in charge and management of said car, while the same was approaching said crossing, so negligently, carelessly and improperly failed to watch and look out for the approach or passage of fire engines upon said street over said crossing; and it failed to look to see if said crossing was and would be then and there clear for the passage of said car; and it failed to try to ascertain if said track over said crossing was and would be clear for the passage of said car; and it did not exercise any greater watchfulness nor give more attention as to whether the track ahead of said car was clear, while said car was approaching and passing said crossing, than at other places on the route of said car.

By reason of the several breaches of duty hereinbefore set forth, and by and through the negligence, mismanagement, improper conduct and unskillfulness of the defendant, by its said servants in that behalf, and the matters aforesaid, the said car then and there ran into and struck with great force and violence upon and against the said fire engine, and thereby the said B was then and there thrown with great force and

violence from said fire engine to and upon the ground and pavement there, and was thereby then and there killed. (Add last two paragraphs of Section 1495)

1518 Street car and wagon, Narr. (Ill.)

For that whereas, the said defendant, B, a corporation organized and doing business under and by virtue of the laws of the state of Illinois, is and was on, to wit, the day of, 19.., engaged in maintaining and operating certain street car lines in the city of, county of, and state of Illinois, and did on, to wit,, so maintain and operate a certain street car line upon and along a certain street in said city of aforesaid, to wit, upon and along, at or near the intersection of said with other streets, to wit, in said city of and county aforesaid, and did then and there run or cause to be run at frequent intervals upon and along said street car line, certain cars belonging to and owned by said defendant., B. And whereas, it then and there became and was the duty of said defendant., B, to operate and run its said cars upon and along said at or near the intersection of said with, in the city of aforesaid in a careful and cautious manner, so as to avoid running into and colliding with vehicles, wagons or persons then and there being and passing along and upon said street and upon the tracks of the said defendant.. B aforesaid:

And whereas, C, a corporation organized and doing business under and by virtue of the laws of the state of, was, on, to wit, the day of, engaged in the business for which said corporation was organized in the city of, and county aforesaid and as part of said business, said defendant., C, was, on, to wit, the day of, driving or causing to be driven upon and along said at or near the intersection of said with in the city of, aforesaid, a certain vehicle or wagon belonging to and owned and controlled by said defendant., C; and it then and there became and was the duty of said defendant., C, to drive or cause to be driven its said vehicle or wagon upon and along said, at or near the intersection of said with aforesaid, with all due care and caution so as not to run into or collide with other vehicles or wagons then and there being driven upon and along said streets aforesaid and upon and along the tracks of the defendant., B.

And whereas, also, heretofore, to wit, on, the defendant., D, was engaged in the general expressing and carrying business for hire in the city of aforesaid.

And whereas, the plaintiff, on to wit, the day of, w.... desirous of being conveyed from the....., situated on said, at or near the intersection of said, with, in the city of, aforesaid, to the, situated on, at or near the intersection of said with in the city of aforesaid, and the defendant.., D, for a valuable consideration then and there undertook and agreed with the said plaintiff to safely carry and convey ..h.., the plaintiff, to ..h.. place of destination aforesaid.

And whereas, the plaintiff at the special instance and request of said defendant.., D, then and there entered into the said vehicle or wagon of defendant.., D, for the purpose of being conveyed to his place of destination as aforesaid; it then and there became and was the duty of the defendant.., D, to exercise all due care and caution in driving and managing ..h.. said vehicle or wagon as aforesaid, while the plaintiff was so riding in the vehicle or wagon of said defendant.., D, so as not to run into or collide with the said vehicle or wagon of the defendant.., C, or with the said car of the defendant.., B, then and there being and passing along and upon said, at or near the intersection of said, with, in said city of, and county aforesaid.

Nevertheless, the said defendants, B, by its servants and employees, C, by its servants and employees and said D, wholly disregarding their said duties in that behalf did so negligently and carelessly operate, manage and drive their respective cars, vehicles and wagons upon and along the tracks of the defendant, B, and upon and along said, at or near the intersection of said, with, in the city of, aforesaid, that the said car of the defendant.., B, the said vehicle or wagon of the defendant.., C, and the said vehicle or wagon of the defendant.., D, without any fault on the part of the plaintiff and while plaintiff was exercising all due care and caution on his part, did then and there with great force and violence run into and collide, each with the other, to wit, at or near the intersection of said, with, in the city of, aforesaid, on, to wit, the day aforesaid, and the plaintiff was then and there and thereby thrown with great force and violence down to and upon the ground and was then and there and thereby greatly bruised, scratched, wounded, injured and maimed upon and about his said person, and then and there and afterwards, to wit, from thence hitherto became, was and is sick, sore, lame and disordered in and about his said person, and has expended divers large sums of money in endeavoring to be healed of his said injuries aforesaid, to wit, the sum of \$....., to the damage of

the plaintiff in the sum of \$, and therefore he brings this suit.

b

For that whereas the plaintiff, on, to wit,, 19..., was employed by A in the capacity of, to wit, a driver or teamster, and was earning, while so employed, the sum of, to wit, dollars per day, and was lawfully driving a two-horse wagon, to wit, south on street at or near the intersection of street, in the city of, county, And the defendant was then and there possessed of and owned, controlled and operated a certain street railway, to wit, an electric street railway, and then and there ran, controlled and operated the same in a northerly and southerly direction on said street, whereon, to wit, motor cars in charge of divers servants of defendant were then and there propelled and operated by, to wit, electricity along and upon said railway in a northerly and southerly direction; and the plaintiff avers that it was then and there the duty of the defendant, by its servants, to propel, operate, manage and control its said cars on said street with due regard and care for the safety of other vehicles and pedestrians, rightfully upon said street there; yet, the defendant, by its servants, wholly regardless of its duty in that behalf, and while the plaintiff was then and there lawfully upon and driving in a southerly direction along said street, in the exercise of due care and caution for his own safety in that regard, carelessly, negligently and improperly propelled, managed and operated its said car then and there moving in, to wit, a southerly direction along said street, in that said defendant carelessly and negligently failed to warn said plaintiff of the approach of said car while well and truly knowing that the plaintiff was then and there ahead of and in front of said car.

2. That it was also then and there the duty of the defendant, by its servants, to propel, operate, manage and control its said cars on said street with due regard and care for the safety of other vehicles and pedestrians rightfully upon said street there; yet the defendant, by its servants, wholly regardless of its duty in that behalf, and while the plaintiff was then and there lawfully upon and driving in a southerly direction along said street, in the exercise of due care and caution for his own safety in that regard, carelessly, improperly and negligently propelled, operated and managed its said car then and there moving in a southerly direction along said street, in that said defendant failed to ring the bell or otherwise notify the plaintiff of the approach of said car.

By reason of the failure to observe and perform the several duties as aforesaid, said car was then and there propelled and ran into and struck with great force and violence against, to wit, said plaintiff and said wagon, wherein and whereon

said plaintiff was riding; by means whereof the plaintiff was then and there thrown with great force and violence from and off said wagon to and upon the ground there; whereby one of the legs of the plaintiff then and there suffered a compound fracture, and he was greatly bruised, hurt and injured and divers bones of his body were then and there lacerated, bruised and broken, and one of the legs of plaintiff was then and there crushed, mutilated and wounded, and said leg has become injured and completely and permanently shortened and the plaintiff has completely and permanently lost the use of said leg, and the plaintiff was obliged to and did lay out divers large sums of money amounting to dollars in and about endeavoring to be cured of his said injuries, received as aforesaid, and also by means of the premises the plaintiff then and there became and was sick, lame and disordered and so remained for a long time, to wit, from thence hitherto, during all which time the plaintiff has suffered great pain and has been hindered and prevented from attending to and transacting his business and affairs, and for the rest of his natural life will suffer great pain and be hindered and prevented from transacting, attending and entering into his usual avocations, by reason whereof the plaintiff has lost and will be deprived of divers great gains and profits which he might and would otherwise have made and acquired as driver and teamster as aforesaid. Wherefore, etc.

(Virginia)

For this, to wit, that prior to the appointment of said receivers, as hereinafter stated, the company was a common carrier of passengers, and the owner and operator of a line of electric street railway and the cars running thereon, in street and other highways in the county of

That by decree of said circuit court of the United States in said cause, entered on the day of, 19.., the said were appointed receivers of the said corporation, and were instructed to continue the operation of said street railway. That said receivers were operating said railway under said decree at and before the time the wrongs and injuries hereinafter mentioned were committed.

And heretofore, to wit, on the day of, 19.., the plaintiff was seated in a jumper and driving a fretful and unruly horse attached thereto along street in a southwesternly direction near the railroad crossing in the county of, which said street was a public highway, when the said defendants were then and there propelling one of their cars along said street, in a northeasterly direction, which necessitated its passing in close proximity to said plaintiff and his said unruly horse.*

And it then and there became and was the duty of said

defendants to use reasonable and ordinary care to so manage and control its said car as not to run into or upon said plaintiff, in case his said horse should become unmanageable and get upon the defendant's said tracks; and the plaintiff's said horse did then and there become unmanageable and did back upon said track, or so close thereto as not to enable said car to pass without striking said jumper and said horse; yet the said defendants, although well knowing the unruly and unmanageable character of said horse, and well knowing that the plaintiff was then and there in peril, did not properly control said car, but, on the contrary, then and there carelessly, negligently and recklessly ran their said car into, against and upon the said jumper.

2. (Here consider as re-written all of first count down to star.)

And as said car did approach and get within forty or fifty yards of said plaintiff, his said horse became then and there fretful, unruly and unmanageable, and backed onto and off said defendants' car tracks in front of said approaching car several times, placing the said plaintiff in a dangerous condition, all of which was visible and known to said defendants, as well as the great peril of the said plaintiff, and also the said plaintiff warned, motioned and cried out to said defendants to slacken the speed of its car and stop the same; and thereupon it became and was the duty of the said defendants to use reasonable care and diligence to slacken the speed of said car and stop the same until the said plaintiff could get safely by said car with his horse; yet, the said defendants, disregarding their duty in the premises, carelessly and negligently failed to stop or slacken the speed of said car, and carelessly and negligently continued to run the said car towards said horse, causing him to become more fretful and frightened, and to back said jumper on the tracks upon which said car was running, and carelessly, negligently and recklessly ran said car into, against and upon the said jumper, whereby the said plaintiff, without any negligence on his part, was thrown from the said jumper to the ground, and was greatly cut, bruised, strained and wounded in his hips, legs, back, sides, arms, ribs and other parts of his body, and suffered much physical pain and mental anguish, and was put to great expense in attempting to be healed of his injuries, and was prevented for a long time from attending to his usual business and occupations, and from earning the accustomed returns from his labor, and has been permanently injured and maimed, and rendered more susceptible to disease than he otherwise would have been, and rendered permanently less able to engage in his usual business and occupations and earn a livelihood; to the plaintiff's damage \$.

And therefore he brings his suit.

1519 Two steam trains, Narr. (Mich.)

For that whereas the defendant on the day of, in said county, was possessed of and using and operating a certain railroad extending to and from the of to the of in said county with certain trains of cars running thereon for the conveyance of passengers for reward. That on the day of, 19.., the plaintiff, at said....., entered a passenger car of a regular train of defendant, and became a passenger on said train for a certain reward to the defendant in that behalf, to be then and there carried from said of to said of, in said county, as by law he had a right to do, and as by law the said defendant was then and there required as a common carrier to carry him the said plaintiff then and there, without any negligence, imprudence, carelessness, or wrong conduct on the part of the managers, agents, engineers, firemen, brakemen, conductors, and other servants of the said defendant, and free from injury, hurts, bruises and damage caused by said negligent, careless, imprudence and wrong conduct.

And therefore it then and there became and was the duty of said defendant to use due and proper care that the said plaintiff should be safely and securely carried and conveyed by and upon said passenger train on said journey from said of to said of....., and it was the duty of the said defendant to see that the said road between said two stations was clear of all other trains, so that the said passenger train could and should run safely to said, and it was its duty and the duty of its managers, agents, conductors, and engineers to so carefully, diligently and cautiously conduct themselves in and about the running of said trains and engines on said road that said passenger train should have a clear track and not collide with any other train or engine.

Yet, the said defendant, not regarding its duty in that behalf, did not use due and proper care that said plaintiff should be safely and securely carried and conveyed by and upon said passenger train on said journey from said to said, but wholly neglected so to do, and that the defendant, its servants and agents did not see that the said road between said two stations was clear of all other trains and engines so that the said passenger train would run safely to said, and would not run into another train or engine; and that the defendant's manager, agents, conductors and engineers did not carefully, diligently and cautiously conduct themselves in and about the running of trains and engines on said road, that the said passenger train should have a clear track and not collide with any other train or

engine, and the defendant wholly neglected its duty in the premises; and contrary to its said duty, and its duty under the law, as a common carrier of passengers, and so carelessly, imprudently and negligently managed the running of its trains and engines, and its manager, agents, engineers, station agents, and conductors so carelessly and negligently and imprudently performed their duty in and about the running of said trains and engines upon its said road at and near the station called, on its said road, that the engine and tender number, was wrongfully, carelessly, negligently and imprudently allowed to be and upon the said track near said, and to be running west so that by and through said carelessness, negligence and imprudence it ran against, upon and into the locomotive of said passenger train, thereby the passenger car in which the plaintiff was then riding as such a passenger was crushed, injured, broken and wrecked and thereby the plaintiff, who was then riding therein without any negligence or want of care on his part, was injured.

That said passenger train upon which said plaintiff was a passenger as aforesaid left the station of said defendant at said, at the usual time, to wit, at about and arrived at, a station on said road, about miles east of said, at the usual time for said train, to wit, at about the hour of, and departed from said station on its way to said, about later. That at a place about a of a mile east of said station the train upon which plaintiff was so riding as a passenger was going east toward said, was run into, and collided with by another locomotive and tender of said defendant, being locomotive number, of said road, which was then running west on the same track; that said locomotive and tender so running west was running backwards, so that when the said locomotive and tender so ran into the locomotive which was hauling the train upon which plaintiff was a passenger, the rear end of said tender struck the head of said passenger locomotive; that said locomotive and tender so running west was so running west on the same line without any right of way and carelessly and with great and unusual speed and without any precaution upon the part of the engineer and fireman in charge thereof to prevent such colliding with any train going east on said track, and without blowing any whistle as a warning for approaching trains, and that there was no conductor of and for the same and that the said locomotive was in charge of an engineer and fireman only; that said engineer was careless and negligent in running said locomotive and tender upon said track in this that he had just a few minutes prior to said collision pushed a train going east to a point about mile east of said, and that after leaving said train that he did not have time to run back with said locomotive

tive and tender to before said passenger train would leave said, going east.

And the engineer of said locomotive number was careless, negligent and imprudent in running back west upon said track; that he did not have time to run back and reach said before said passenger train would pull out going east; that he knew said passenger train was due to leave said station at, and that he knew, or ought to have known, that he did not have time after leaving the train that he had been pushing to go back and reach before said passenger train would pull out of, going east; that said engineer of said locomotive number attempted to make said run west of without any order or permission from the proper officer of said defendant, and in violation of the laws and rules of said defendant company in regard to the running of trains upon said road.

That by the rules and regulations of said defendant company regarding the duty of its locomotive engineers and conductors of trains, it was forbidden that any engineer or conductor should run his train or engine upon the time of another train, and it was also forbidden that any engineer or conductor should run his engine or train so that there would be any possible danger of a collision with any other train or engine, and it was also forbidden that such engineer or conductor should run his engine or train from one station to another, or from any point upon the line to another point upon the line without permission or order of a servant of said company called a train despatcher; that the engineer of said engine number in the performance of his duty and in compliance with said rules and regulations ought, after leaving said train that he had pushed east of to have waited at a suitable and convenient side-track on said road until said passenger train had passed before attempting to go west to said

That said collision was caused by the aforesaid negligence, carelessness and imprudence of said engineer of said locomotive number and by his said disregard and disobedience of said rules and regulations of the defendant and by the said defendant not having and providing a conductor for said locomotive number

That said locomotive and tender number struck said passenger locomotive in said collision with great force and violence and the said locomotive and tender number and passenger train were brought together with great force and violence.

That said plaintiff while so riding on said passenger train was sitting in the car next to the engine upon a seat provided for passengers and had remained sitting upon said seat during all of said journey and down to the time of said col-

lision; that he did not do any act or thing to cause said collision; that he, during all of said time conducted himself with care and due regard for his own safety; that he used due care and diligence in and during all of said journey and that he was not in and about said collision and wrecking of said passenger train and the consequent injury to himself guilty of any negligence whatever which would in any way contribute to said collision or to the injury to him.

That by means of said collision and the wrecking of and injury to said passenger car, in which the plaintiff was so riding, and by said car being broken and crushed in about the tender and engine in collision with said engine number, the plaintiff was struck by portions of said passenger car and by the tender of the engine of said train being forced against and into said car, so that he was thrown out of said car and fell down to and upon the ground and the plaintiff was so struck that he was bruised, wounded, cut and injured and his body was wrenched and he was knocked into insensibility, and that he received thereby several severe cuts and wounds upon his head and was wounded and bruised upon his left arm, and that both his legs were bruised and wounded and that his left leg received a severe cut and that his back was injured and that his back was sprained across the kidneys and that he was injured internally, and that by so being struck, wounded, bruised and injured, his nervous system became injured and impaired. And also by so being struck, wounded, bruised and injured and wrenched his bladder was injured.

That at the time of said collision and the consequent injury to plaintiff he was of the age of years, was at the time prior to said injury a strong man, physically and mentally, and in good health and with a prospect of a long life before him. That by so being struck, wounded, bruised and wrenched he was permanently injured in his legs and that he has become thereby weak and also thereby his back was permanently injured and weakened and that thereby his bladder and kidneys were permanently injured and weakened.

That by reason of his injuries so received by him, plaintiff was rendered incapable and unable by reason of the physical weakness arising from said injuries, from carrying on his business and occupation during the remainder of his life. That the business in which the plaintiff has been engaged for many years is that of exploring and conducting and carrying on and superintending mining operations in of, in which business and occupation he has always been accustomed to earn and receive large compensation as earnings, by reason of his skill, experience and reliability in such business and occupation.

That said business and occupation is and was such that it required his personal attention and presence upon the lands, explorations and mines in which the work and operations

were carried on. That by the injuries so received by him in said collision the plaintiff has been totally and forever disabled and incapacitated from continuing in said business and occupation. That he has no other occupation, business or profession. And also by reason of the premises the said plaintiff became and was sick, sore, lame and disordered and so remained and continued for a long space of time, to wit, from thence hitherto, during all of which time the plaintiff suffered and endured great mental and physical pain and was hindered and prevented from transacting and attending to his necessary and lawful affairs by him during all that time to be performed and transacted; and also was deprived of divers great gains, profits and advantages which he might and otherwise would have derived and acquired; and that thereby also said plaintiff was necessarily forced and obliged to and did then and there pay, lay out and expend divers large sums of money amounting in the whole to the sum of dollars in and about endeavoring to be cured of the said bruises, cuts, injuries and in and about being nursed and attended and assisted as he necessarily must be because of his said weakness in his legs, back, kidneys and bladder. In all to the damage, etc.

1520 Two street cars, Narr. (Ill.)

For that whereas, on and before, to wit, the day of, 19.., at the city of, county of, and state of Illinois, the defendant was in the possession of and using a certain line of street railway, commonly known as the line, of said defendant, running along, upon and over street, and divers other streets in the said city of, together with certain cars thereunto belonging and used for the conveyance of passengers for a certain reward to the defendant in that behalf, and operated by means of electricity; that at the time aforesaid she was a passenger on one of the said cars of the said defendant, which said car was then and there being run in a southerly direction along, upon and over street at or near the intersection of street and street; that it then and there became and was the duty of the said defendant to have used the highest degree of care to safely carry the plaintiff, so being a passenger, as aforesaid, in and on said car aforesaid, along, upon and over the route traveled by the same; yet, the defendant did not regard its duty in that behalf and did not use due and proper care that the plaintiff should be safely carried in and on said car aforesaid, but neglected so to do; and by reason thereof, afterwards, and while the plaintiff was a passenger on said car aforesaid and in the exercise of all due care and caution for her own safety, at or near a certain point

in said city, county and state, to wit, the intersection of street and street, the said car aforesaid collided with a certain other car of the said defendant; by means and in consequence whereof the plaintiff was thrown with great force and violence upon and against a certain seat of said street car, and by means whereof the plaintiff's back and head were severely hurt, bruised, wounded and injured, and she was injured in and about the abdomen and in and about the spinal cord, and her back, head and hip were greatly contused, and she suffered severe nervous shock, and her mind became impaired and seriously injured, and she was injured both internally and externally, and became therefrom sick, sore, lame, and disordered, and will be sick, sore, lame, and disordered the remainder of her life, during all of which time the plaintiff has suffered and will suffer great pain, and has been prevented from attending to and transacting her usual and ordinary affairs and duties, and has lost and will lose divers great gains and profits which she otherwise would have made and acquired; and also by means of the premises she was then obliged to and became obligated to pay, lay out and expend divers large sums of money, amounting to, to wit, dollars, in and about endeavoring to be cured of her said hurts, bruises, wounds, injuries and contusions received as aforesaid, to the damage, etc.¹⁵⁵

(Maryland)

For that the defendant is a body corporate, duly incorporated, and a carrier of passengers for hire; that theretofore, to wit, on or about the day of, 19.., the defendant accepted the plaintiff to be its passenger, receiving from her fare as such, to be transported upon one of its cars in its service in city; that thereupon it became and was the duty of the defendant while the plaintiff was such passenger, to exercise the highest degree of care practicable under all the circumstances to transport the plaintiff in safety; that in neglect and default of its said duty in the premises, said defendant did not exercise the highest degree of care practicable under all the circumstances to transport the plaintiff in safety, but on the day and year aforesaid, a collision occurred between the car in which the plaintiff was being so transported by the defendant, and another car of said defendant operated by its agents and servants, whereby the plaintiff was seriously and permanently injured about the head, body and limbs, the sight and hearing being permanently impaired, caused to suffer great physical pain and mental anxiety, disqualified from pursuing any avocation by reason of which

¹⁵⁵ Greinke v. Chicago City Ry.
Co., 234 Ill. 564, 565 (1908).

she has lost the emoluments she otherwise would have received, has been put to great expense for professional attention and treatment, and the purchase of necessary medicines, and appliances, and is otherwise injured and damaged.

And the plaintiff says that her said injuries were directly caused by the negligence and want of care of the defendant, its agents and servants in the premises, and without negligence or want of care on the part of the plaintiff directly thereunto contributing; wherefore this suit is brought.

And the plaintiff claims dollars damages.

b

For that the defendant is a body corporate, duly incorporated, and owns, operates and maintains a double track electric railway, between the city of, in the state of Maryland, and the city of, in the District of Columbia, and a single track electric railway, connected therewith with the Naval Academy Junction, in the state of Maryland, and the city of Annapolis, also in said state, and is a carrier of passengers for hire; that heretofore, to wit, on or about the day of, 19.., the defendant accepted, the minor son of the equitable plaintiff in this case, to be its passenger, from city to the city of, and received from him his fare, or ticket as such; that then and there it became, and was the duty of the said defendant to exercise the highest degree of care proper under all the circumstances to transport the said, the minor son of the equitable plaintiff, in safety to his destination; that in neglecting its said duty in the premises while the equitable plaintiff's said minor son was such passenger, the said defendant did not exercise the highest degree of care practicable under all the circumstances to transport him in safety to his destination, but that while the said, the equitable plaintiff's minor son, was such passenger, on the said day of, 19.., as aforesaid, the car upon which the said equitable plaintiff's son, was riding, by reason of the negligence, and want of care of the defendant, its servants and agents in the premises, collided with another car, also operated by the defendant, its officers, servants and agents, coming in an opposite direction upon the same single track, at or near station, in the state of Maryland, in consequence whereof the equitable plaintiff's minor son was killed, and that the death of the said, the minor son of the equitable plaintiff, was directly caused by the act, negligence and default of the defendant, its officers, servants and agents, and without any negligence, or want of care upon the part of the said directly thereto contributing; that the said deceased at the time of his death was engaged in the wholesale and retail business, in the city of, for the benefit, and on account of the said equi-

table plaintiff, from which business he derived for the equitable plaintiff, great emoluments, and contributed largely to the support and maintenance of this equitable plaintiff, his wife and family, and would have continued to do so until he had attained his majority, but for his death occasioned as aforesaid; that by reason of the death of the said, under the circumstances aforesaid, the equitable plaintiff has been deprived of this source of maintenance and support, and has likewise directly sustained great pecuniary loss, damage and injury.

Wherefore this suit is brought and the plaintiff claims dollars damages.

1521 Couplers defective, assuming risk, proof

Under state and Federal statutes, a common carrier owes an absolute duty, not merely that of exercising reasonable care or good faith, to equip its empty and loaded cars with automatic couplers and to maintain them in a condition that the cars may be coupled and uncoupled without requiring employees to go between them when in the performance of their duties; and in an action for a violation of the Illinois statute, the plaintiff is not obliged to prove that the common carrier did not exercise reasonable care to maintain the safety appliances in good condition and repair.¹⁵⁶ Under the Illinois statute, an employee does not assume the risk of an injury by going between cars in the performance of his duties.¹⁵⁷

1522 Couplers defective; brakeman injured, Narr. (Ill.)

For that whereas, the defendant, on, to wit, the day of, 19.., was a railroad corporation and was possessed of and using and operating certain lines of railroad running through parts of the states of Illinois and, some of which said lines extended through part of the county of state of, and some of the same lines extending through a part of the county of, state of, to the city of, and that the said defendant was possessed of a large number of locomotives and cars, which it used upon the said lines, also using and hauling cars for other lines operating in this and other states, which said locomotives and cars and lines of railroad the said defendant used in operating a certain system engaged in interstate commerce as a common carrier, and was then and there

¹⁵⁶ *Luken v. Lake Shore & M. S. Ry. Co.*, 248 Ill. 377, 382, 383 (1911); *Laws* 1905, p. 350 (Ill.); 1901 U. S. Comp. St., p. 3174; 1909 U. S. Comp. St., p. 1143.

¹⁵⁷ *Luken v. Lake Shore & M. S. Ry. Co.*, 248 Ill. 388.

engaged in interstate commerce on the day and date aforesaid, and had been so engaged for many years immediately before that time. That on the day and date aforesaid, and for a number of months prior thereto, he was in the employ of the said defendant as a freight brakeman, working with a crew operating between the city of, county of, aforesaid, and the city of, in the county of aforesaid, in the service of the said defendant while the said defendant was so engaged as a common carrier of interstate commerce.

And the plaintiff avers that the defendant on the day and date aforesaid, being a railroad corporation engaged in interstate commerce as a common carrier as aforesaid, it then and there became and was the duty of the said defendant to have its cars used in moving interstate traffic equipped with couplers coupling automatically by impact, so that the said cars could be coupled and uncoupled without the necessity of men going between the ends of the cars, according to an Act of Congress, entitled, "An Act to promote the safety of employees and travelers upon railroads by compelling common carriers engaged in interstate commerce to equip their cars with automatic couplers and continuous brakes, and their locomotives with drive wheel brakes, and for other purposes," approved March 2, 1893; and it then and there became and was the further duty of the said defendant to keep the same in reasonably safe condition and repair so that the plaintiff and other servants of the said defendant would not be exposed to unnecessary danger while in and about the performance of their duties in and about the coupling and uncoupling of cars and engines while in the exercise of due care and caution for their own personal safety.

And plaintiff avers that on, to wit, the night of the and of, 19.., at, to wit, after the hour of midnight, the train crew, of which plaintiff was a member, were at a point in the city of, on the line of the said road, known as, and had with them the engine and caboose in their charge; that on the night aforesaid, the said crew was ordered to take their engine and caboose and proceed to the station of, to pick up a train of cars to bring to the city of; that the said defendant, notwithstanding its duty in that behalf according to the statute aforesaid, negligently and carelessly failed to have its said caboose equipped with couplers coupling automatically by impact, and negligently and carelessly failed to keep the same in reasonably safe condition and repair, so that the plaintiff would not be exposed unnecessarily to danger of injury by being compelled to go between the end of the caboose and the end of the engine for the purpose of coupling said engine to the said caboose; that the said defendant then and there negligently and carelessly permitted one of the couplers, or draw bars upon its said caboose, which said

coupler or draw bar it was then and there necessary for this plaintiff to use in making a coupling with defendant's engine aforesaid, to be and remain in a dangerous and unsafe condition and out of repair, which said dangerous, unsafe and defective condition of the said draw bar or coupler was known to the defendant and had been known to the defendant for, to wit, many weeks prior to the said time.

2. And plaintiff further avers that the said defendant on the day and date aforesaid, being a railroad corporation operating certain lines of railroad, and using thereon certain cars, known as cabooses, and certain locomotives as aforesaid, it then and there became and was its duty to furnish its employees with reasonably safe machinery and appliance with which to work, and to keep the same in reasonably safe condition and repair, so that the plaintiff and other servants in and about the performance of their duties while in the service of the said defendant would not be unnecessarily exposed to danger of injury while in the exercise of ordinary care and caution for their own personal safety; but that, on, to wit, the hour of o'clock .. M. on the day of, 19.., the said defendant negligently and carelessly failed to furnish this plaintiff with reasonably safe machinery, appliances, etc., and negligently and carelessly failed to keep the same in reasonably safe condition and repair. That is to say, that on the night aforesaid, after having attempted to equip its certain caboose, which was in the charge of the freight crew of which this plaintiff was a member, with an automatic coupler, the said defendant permitted the same to be and remain in a dangerous and unsafe condition, which dangerous and unsafe condition had previously been reported to the said defendant, and which dangerous and unsafe condition was unknown to this plaintiff.

And plaintiff avers that by reason of the negligence of the defendant aforesaid, and because the said defendant had negligently and carelessly failed to have its caboose equipped as aforesaid, according to the statute of the United States in such case made and provided, and had failed to keep the said caboose, after having once attempted to comply with the statute aforesaid, in a reasonably safe condition and repair, according to the intent and purpose of the said statute as aforesaid, that this plaintiff, while in and about the performance of his duty in attempting to couple his engine to his said caboose, at a point on the said defendant's line known as, his right hand caught and was crushed between the draw bar of the said engine and the draw bar of the said caboose, and while the said plaintiff was in the exercise of ordinary care and caution for his own personal safety, bruising, mangling and crushing plaintiff's said right hand so that amputation became and was necessary at a point above the wrist, causing the plaintiff herein to become permanently injured and

crippled, for, to wit, from thence hitherto, during all of which time he thereby suffered great pain and agony and was hindered from transacting his business and affairs and from following his usual occupation; also by means of the premises he was thereby obliged to and did lay out divers sums of money, amounting to, to wit, dollars, in and about endeavoring to be healed of his wounds, sickness and disorder; to the damage, etc.¹⁵⁸

1523 Couplers defective; switchman injured, Narr. (Ill.)

For that whereas, heretofore and, on, to wit, the day of, 19.., the defendant was possessed of and operating a certain railway which extended, among other places, through a portion of the state of Illinois, and it was then and there a common carrier engaged in interstate commerce and in moving traffic upon its said railway line between points in said state, and the plaintiff was then and there employed by the defendant as a switchman to switch with certain engines and cars which it then and there operated upon its said railway line, and as such switchman earned, to wit, dollars per month; that at the time and place aforesaid, to wit, at the defendant's railway yards which it operated in connection with and as a part of its said railway line, to wit, at, in the city of, in the county and state aforesaid, the defendant unlawfully, wrongfully and negligently, and contrary to the statute in such case made and provided, hauled and used upon its said railway line in moving said traffic between points in said state a certain car equipped with a certain coupler, which, by reason and in consequence of its then improper and defective condition of repair, could not be coupled automatically by impact without the necessity of its switchmen going between the ends of said cars.

2. And the plaintiff further alleges that at the time and place aforesaid, to wit, in the defendant's railway yards which it operated in connection with and as a part of its said railway line, at, to wit,, in the city of, in the county and state aforesaid, the defendant unlawfully, wrongfully and negligently, and contrary to certain Acts of Congress in such case made and provided, hauled and used on its said railway line in moving interstate traffic a certain car equipped with a certain coupler, which, by reason and in consequence of its then improper and defective condition of repair, could not be coupled automatically by impact without the necessity of its switchmen going between the ends of said cars.

That said plaintiff as such switchman was then and there

¹⁵⁸ Chicago & Alton Ry. Co. v. Walters, 217 Ill. 87 (1905).

required by the defendant to couple said car on to a certain other car then standing upon the same track and close to it, and in the discharge of his duty as such switchman and while he was exercising ordinary care and caution for his own safety, he was, as a direct result and in consequence of the said defective and improper condition of said coupler, required to and did go between the ends of said cars for the purpose of attempting to adjust said coupler in order that it might be coupled on to said other car, and while so being between the ends of said cars and while attempting to adjust said coupler for the purpose aforesaid, said other car was, without the knowledge of the plaintiff, moved back against said car so equipped with said coupler in said defective and improper condition of repair as aforesaid, and as a direct result and in consequence of the said defective and improper condition of said coupler as aforesaid, which necessitated plaintiff's going between the ends of said cars and of his so being between the ends of said cars for the purpose aforesaid, one of his hands and arms was thereby then and there caught and crushed between the ends of said cars and his said hand and arm were thereby then and there so seriously crushed and mangled that their use has become and is greatly and permanently impaired, and divers other bones, ligaments, muscles, tendons and membranes of the plaintiff's body were also thereby then and there sprained, dislocated, broken and otherwise injured, and he sustained a serious shock to his nervous system, and as a direct result of his said injuries he has ever since suffered and will continue permanently to suffer great pain, and has become and is permanently crippled, sick, sore and disordered, and incapacitated from attending to or transacting his regular business, or any ordinary business or affairs, and he has thereby been and will continue permanently to be deprived of great gains and profits which he might and otherwise would have made and acquired, and he has been compelled to and did incur, expend and lay out for medical attention, nursing, medicines and otherwise, divers large sums of money, amounting to, to wit, the sum of dollars, in and about endeavoring to be cured of his said injuries, sickness and disorders, occasioned as aforesaid. To the damage, etc.

b

For that whereas the said defendant was, on, to wit, day of, possessed of, and operating certain locomotive engines, cars, trains of cars, railroad tracks and railroad yards in, or near, the city of in county, Illinois, and on the said date defendant was engaged in switching certain railway cars by means of a certain locomotive engine, which said engine and train of cars were in charge of a certain night switching crew of defendant, which crew, including plaintiff, was under the direct supervision and control of a certain foreman by the name of,

who was not then and there a fellow-servant of plaintiff; that plaintiff was then and there in the employment of the said defendant as a member of said switching crew in the capacity of switchman, it being the duty of plaintiff to couple and uncouple cars and to do the work usually and ordinarily done by a switchman of a yard switching crew; and that plaintiff was then and there inexperienced in said work and was unfamiliar with the hazards and dangers incident thereto.

And plaintiff further avers that one of the couplers with which the said cars were coupled and which said plaintiff was attempting to operate was defective and out of repair, so that said cars could not be uncoupled from the side on which plaintiff was working; that, in obedience to the direct and specific order of the said foreman, who then and there had authority to direct and order the plaintiff in and about said work, plaintiff got upon one of said cars and crossed over the same to uncouple said cars from the opposite side, and said foreman then and there knew, or should have known, that to suddenly check the motion of said moving cars while the plaintiff was uncoupling said cars, or before he had fully regained his balance after having uncoupled the same, would necessarily place plaintiff in a perilous and very dangerous position and would in all probability cause him to fall upon said railroad tracks in front of said cars; that while plaintiff was attempting to uncouple said cars, or after having just uncoupled the same, and while in the exercise of reasonable and ordinary care and caution for his own safety, the said foreman of the defendant negligently and carelessly signaled and caused the engineer in charge of said locomotive engine to suddenly check the motion of said locomotive engine and cars thereto attached, which caused the said cars to jerk or jolt, thereby throwing said plaintiff from said car to the ground there and upon the tracks over which said cars were being propelled, and some of said cars then and there ran over said plaintiff, thereby crushing, mashing and mangling said plaintiff's legs and left arm so that it became necessary to amputate both of said legs and said arm, whereby said plaintiff was seriously and permanently injured, and became sick, sore, lame and disordered, and so remained from thence hitherto, and thereby plaintiff suffered great pain of body and mind, and will continue so to suffer through his entire lifetime, and has lost a large amount of wages and has been deprived of his means of livelihood, and has expended and will expend a large amount of money for nursing, medicines and medical attention in endeavoring to be cured of said injuries, which said injuries were directly and proximately caused by the careless and negligent order of said foreman, in directing and commanding the plaintiff to get upon and cross over to the opposite side of one of said cars and to uncouple therefrom certain of said cars while in motion, and by the negligence of the foreman in carelessly causing the engineer to suddenly

slacken the speed of such locomotive engine and cars thereto attached while plaintiff was attempting to uncouple said cars, or was in the act of regaining his balance after having uncoupled same, in obedience to a direct and specific command and order of said foreman, to the damage, etc.

1524 Dangerous premises, invitation, action

The owner or tenant is bound to take reasonable care to see that his premises are in a reasonably safe condition for persons who come there upon his direct or implied invitation; and he is liable for an injury which results from a failure to perform that duty to a person who has exercised reasonable care for his own safety while using the premises for the purpose for which the invitation was extended.¹⁵⁹

1525 Depot grounds; trespassers, action, proof

Ordinarily, the obligation of care to avoid injury of a trespasser arises at the time that his perilous position becomes known to those who are in charge of the train. This has no application to depot grounds and platforms provided for the use of the public in the transaction of its business, where persons have a right to be for legitimate purposes and where they may reasonably be expected. If they are there for a legitimate purpose in connection with the business of the railroad company they have a right to demand the exercise of reasonable care for their safety. If they are simply idlers, loiterers or trespassers, the duty of the company is only to abstain from wilful or wanton negligence. This duty is owing to an indeterminate part of the public generally, giving a right of action to anyone of the general public who suffers from a violation of that duty.¹⁶⁰ The running of a train at night without headlight and without warning by bell or whistle over unlighted station grounds and along a platform where persons may reasonably be expected tends to prove a wanton and reckless disregard of such persons safety, and no specific knowledge of their presence on track or platform, or the existence of specific ill-will toward or an intention to injure them are necessary.¹⁶¹

¹⁵⁹ *Devaney v. Otis Elevator Co.*,
251 Ill. 28, 34 (1911).

¹⁶⁰ *Neice v. Chicago & Alton R.*
Co., 254 Ill. 595, 603 (1912).

¹⁶¹ *Neice v. Chicago & Alton R.*
Co., 254 Ill. 604.

1526 Depot grounds, Narr. (Ill.)

For that whereas the defendant, the, on the day of, 19.., and for a long time prior thereto, owned and operated a certain line of railroad extending through said county of and in and through the said city of in the said county, over which said line of railroad the said railroad company on the date aforesaid knowingly permitted the other defendant herein, the railroad company, to operate trains of cars drawn by locomotive engines; that, on the date aforesaid, the said railroad company had a depot on the west side of the tracks of its said line of railroad in the said city of, which said depot was used by the patrons of the railroad company, the railroad company and other roads passing through the said city of; that on the east side of said depot there were lines of railroad tracks extending in a northerly and southerly direction; that the said railroad company had constructed between the second and third railroad tracks to the east of the depot a platform for the use of the people going to and from trains on said track, and had constructed, from the said depot eastwardly across the said tracks to and from said platform, a board sidewalk leading from said depot toward one of the streets of said city of extending eastwardly from said depot; that said platform and the walk aforesaid, were used and frequented by large number of people every day, and at all times, by people going to and from said depot, which fact was known to the defendants; and that on the date aforesaid, her intestate who had come to the said depot for the purpose of going to, Illinois, upon one of the trains of the said railroad company from the said depot, was standing upon said platform, and near or upon the walk aforesaid, waiting for the railroad company train, which was then approaching said depot, to stop at said depot.

And that the defendant, the railroad company, through certain of its servants in charge of a certain engine and train of cars, with gross negligence and reckless disregard for the safety of persons who might be upon said cross-walk and platform, wantonly and wilfully ran and operated the said engine and train of cars along and upon the said tracks of the railroad company in the night time at a high rate of speed, without ringing a bell or sounding a whistle and without having a proper headlight burning upon said engine and without the engineer in charge of said engine looking in front of said engine, past said depot and platform and over said cross-walk in the said city of while plaintiff's intestate was standing upon said platform and cross-walk, as aforesaid, whereby said engine was driven upon and against plaintiff's intestate, inflicting injuries upon him from which he

died on the same day. (Add last two paragraphs of Section 1495)

1527 Derrick injury, Narr. (Ill.)

For that whereas, on, to wit,, 19.., said defendants were engaged in the business of constructing or doing work in and about a certain building, at or near the corner of streets, in the city of county and state aforesaid, and in the course of their said work it became necessary to tear down or break down portions or all of a certain structure supporting all or a portion of an alley, which said structure was in divisions or panels; and that the plaintiff was an iron worker employed in said work and in said panels.

And it then and there became and was the duty of the defendant company to exercise ordinary care in and about its premises aforesaid, so that the plaintiff and others who were then and there employed by the defendant company and engaged in its work should not suffer nor be endangered by carelessness; yet, the defendant, notwithstanding its duty in that regard, wrongfully, negligently and improperly caused a large piece of iron to be raised by means of a derrick and dropped on the structure that it was then engaged in tearing down and removing, without giving the defendant any warning and without notifying him that such action was dangerous; that he had no knowledge that danger attended said operation; said plaintiff avers that said operation was not done by a fellow-servant of this plaintiff; and that by the premises aforesaid, when the iron was dropped, a large portion of the structure came down carrying with it the plaintiff.

2. And it also became and was the duty of the defendant to use reasonable and ordinary care in and about the premises, so as to provide the plaintiff with a reasonably safe place, and appurtenances on, in and with which to do the work for which he was employed; yet, the defendant, disregarding its legal duty in that behalf, proceeded to destroy and break down said structure, panel by panel, or in divisions, by dropping from a height thereon a heavy brake or beam, and before so doing had wrongfully and negligently loosened or removed various rods, bolts, ties or supports whereby said panels in said structure were kept in place, thereby weakening and endangering the structure, of which condition the plaintiff was ignorant, the defendant having negligently failed to inform him; that while the panels or divisions of the structure were in such weakened condition the defendant negligently dropped a heavy weight to or on the north part of said panels, and thereby while the plaintiff, who was in the exercise of ordinary care for his own safety and without the fault of any fellow-servant, and while he was working to the south of and some distance away

from the place on which the weight was dropped, was thrown down by the collapse or fall of the weakened structure, occasioned by the wrongful dropping of the weight thereon.

By means whereof the plaintiff was injured in and about his head, body, and limbs, and divers bones of his body were broken, sprained and injured, his nervous system was shattered and wrecked, and he sustained various other physical and mental injuries, all of which injuries are permanent and incurable; and he became and was sick, sore, lame and disordered, and so remained from thence hitherto. And the plaintiff avers that by means of the premises he lost his usual gains and profits as an iron worker, to wit, the sum of dollars per day from thence hitherto, and he was compelled to and did lay out a large sum of money, to wit, dollars for medicine, care, surgery, attendance, nurses and appliances in and about being healed and cured of his injuries aforesaid. To the damage, etc.

1528 Drover's unsafe place, Narr. (Ill.)

For that whereas, heretofore, to wit, on the day of, 19.., the defendant was owner of, possessed, using, and operating a certain railroad extending from, in the county of aforesaid, through a portion of said county to, in said state and elsewhere, and was also possessed of, using, and operating divers locomotive engines and trains of cars for the purpose of transporting freight and passengers for hire and reward; that said plaintiff was then and there engaged in the business of buying, shipping and selling live stock, and on the day aforesaid he delivered to said defendant at a car loaded with cattle to be transported by said defendant in its said car on its said railroad in one of its said freight trains to the said city of for hire and reward; that it then and there became necessary for him to accompany said car load of cattle on said trip for the purpose of watching over and caring for the same; that the defendant in consideration thereof, and of the payment of said freight on said car load of cattle, then and there issued to the plaintiff a drover's pass or ticket, by means whereof the plaintiff was entitled to ride upon said freight train from to for the purpose of watching over and caring for said cattle while so enroute; and that the defendant, in consideration thereof, then and there undertook, promised and agreed to carry, convey and transport the plaintiff in safety as a passenger upon said freight train from to for the purpose aforesaid.

And the plaintiff further avers that it then and there became and was the duty of the defendant to furnish him a suitable and reasonably safe place to ride upon said freight train from to and to give him a reasonable

opportunity to inspect and care for said cattle while so enroute, with safety to his own person. Yet, the defendant, totally disregarding its said duty in that behalf then and there by defendant's conductor in charge of said train, while the plaintiff was riding thereon in the caboose and in a place of safety, carelessly and negligently, well knowing the hazard of said position, notified and directed the plaintiff to leave said caboose and ride upon the locomotive engine while so enroute so that time might be saved in the inspection of said cattle by the plaintiff during the stoppage of said train at the city of, where it became and was necessary to inspect said cattle, and the progress of the defendant's said train and business might be thereby facilitated.

And the plaintiff avers that, relying upon said invitation of the defendant's said conductor, he then and there left said caboose and mounted said engine and took a position upon the gangway, using due care and caution for his own safety, for the purpose of riding thereon to expedite the inspection of said car of cattle which was located in said train next to said engine, upon the stoppage of said train in the city of; that it was then night time and was very dark upon said engine, and while so riding thereon, standing in the gangway between the said engine and the tender, it became and was necessary for the fireman, one of the defendant's servants then and there in charge of said engine, to occupy the position where plaintiff was standing for the purpose of tending the fire; that said fireman instead of directing plaintiff to a place of safety upon said engine where he might ride without being subjected to danger of injury, as he might have done, on the contrary, well knowing the dangers and hazards incident to such position, then and there wilfully and wantonly disregarding plaintiff's safety, invited, ordered and directed the plaintiff to change his position from said gangway to a seat at one side of said engine cab; that that portion of said engine was very dark and was not illuminated by a light of any kind; that there was an open window adjoining said seat to where he was so directed, which rendered said position extremely hazardous to one not familiar with its dangers, and that he, the plaintiff, was unfamiliar with the surroundings of said position and did not know of the dangers and hazards incident thereto.

And the plaintiff further avers that relying upon said invitation and believing that said position was one of safety, he then and there proceeded to said portion of said engine, and while endeavoring to take a seat at said point, by reason of the darkness of the surroundings, the narrowness of the position, the open window, and the motion of the engine, he suddenly and unavoidably lost his balance, fell and was thrown from said dangerous position through and out of said open window upon the adjacent track, with great force and violence, whereby the plaintiff was greatly hurt, wounded, and the bones of one of

his limbs was shattered, broken and fractured in two places, and divers other bones of his body were wrenched and broken, and he became and was sick, sore, lame and disordered, and so remained for a long space of time, to wit, from thence hitherto, and has been and will continue to be permanently crippled and disabled, and has suffered great pain and misery, and has been compelled to, and did pay out divers large sums of money, to wit, dollars for nurse hire and physician's bills in endeavoring to be cured and healed of his said injuries. Wherefore, etc.

1529 Electric light, action

A municipality which is engaged in furnishing electric lighting is not liable for negligence of its officers, agents and employees when furnishing the service for lighting its public streets, public places and buildings, but it is liable for such negligence when furnishing light to its inhabitants for compensation.¹⁶²

ELECTRIC POWER INJURIES

1530 Bridge wires, dangerous proximity, Narr. (W. Va.)

For this, to wit, that on, to wit, the . . . day of . . . , 19. . . , the date of the committing by said defendant of the grievances hereinafter mentioned, said defendant was in possession of and maintaining and operating as owner a certain powerhouse and electric light plant for the purpose of operating its cars and the manufacture and sale of electricity, electric light and power for hire, profit and reward to the said defendant in that behalf, in the town of . . . , . . . county, West Virginia, and elsewhere; and was then and there the owner and maintaining and operating in connection therewith a certain system of wires running with, over, along and upon the streets in said town, consisting of certain wires running from its said powerhouse as feed wires; and certain wires running along the streets in said town used in the operating of its cars along the line of its railroad; and of certain wires running from its said powerhouse along the streets in said town used by defendant for the purpose of doing a general electric light and power business in said town and elsewhere, and of a certain wire, a part of said system of wires, hung and suspended over, along and upon certain poles owned, maintained and controlled by defendant upon and over the streets in said town called the . . . road, sometimes known as the . . . pike, which road passes through the said town of . . . and crosses . . . creek in said town at a point near

¹⁶² Hodgins v. Bay City, 156 Mich. 687, 692 (1909).

the mouth of said creek by means of a bridge, which bridge is an arched bridge having its highest point at or near its center and is known as the "..... bridge" and is a part of and a continuation of said road; that said road and said bridge are and have been a public highway in said town continuously for more than years last past, and have been continuously used and traveled as a public street and highway of said town by its citizens, as well as by other persons, for the period last before named; that the school house in said town was on the day and year aforesaid situate near the said bridge, and said bridge was constantly used by school children, as well as others, in going to and from said school; that the coping on the easterly side of said bridge was frequently used by school children and other children as also by adults in crossing said bridge; that said last named wire extended along said road on said poles to a pole owned by defendant situate near the northerly abutment of said bridge at the easterly side thereof, and thence stretched across the said creek to a pole owned by defendant near the southerly abutment of said bridge and at the easterly side thereof; that both the said poles and the said wire were situate on said day and for a long time prior thereto in close and dangerous proximity to the easterly side of said bridge; that the center of said bridge is near the center between the said poles, and the said center of said bridge is the highest point of the same; that in passing over said creek from said pole on the northerly side thereof, the said wire passed in close and dangerous proximity to the portion of said bridge at and near the center on the easterly side thereof; that the said easterly side of said bridge is the side of the same designed for pedestrians and is the side on which the foot passage way is located; that said easterly side was, on the day and year aforesaid and prior thereto, and now is, the side of said bridge used by pedestrians in crossing the same; and that the said wire is the middle wire of the three wires of defendant passing over said creek at the easterly side of said bridge and at and near said central point.

Plaintiff further avers that said defendant on the day and year aforesaid, owned, maintained, operated and controlled said wire in manner aforesaid as a part of its said system of wires in said town of, for the purpose of its said business and for hire, profit and reward to the said defendant in that behalf; that said wire was then and there heavily charged with electric current, and that it then and there became and was the duty of said defendant to use such care as is required by law to so operate, control, insulate and maintain said wires as to prevent the same from injuring pedestrians and others lawfully passing along said bridge, it being a part of said road and a public street and a highway.

Plaintiff further says that through said wire, passing as

aforesaid within near and dangerous proximity to said bridge, defendant, prior to and on the day and year aforesaid, was and had been transmitting and distributing electricity in large and deadly quantities for its use and purposes as aforesaid.

Plaintiff further alleges that all the aforesaid facts were prior to and at said times well known to defendant.

Plaintiff further says that it was the duty of said defendant to have insulated said wire and to have maintained such insulation so that persons coming in contact therewith in crossing said bridge on said highway or in proximity thereto would not be injured by coming in contact with said wire; that it was also the duty of said defendant to have inspected said wire at reasonable intervals to see that the same continued to remain in condition so that any former insulation, if it had become defective to such an extent as to expose said wire, should be remedied and repaired so that thereafter persons in crossing said bridge or in proximity thereto should not be injured by coming in contact with such wire; that it was also the duty of said defendant where said wire crossed said creek, and at and near said high point of said bridge, to have placed and maintained said wire at a distance from said bridge and at a height above said bridge, or either, as would prevent pedestrians from coming in contact with the same in crossing said bridge; that it was also the duty of said company to insulate its said system of wires, and each of them, at all points where said wires, or either of them, passed along or in dangerous proximity to said passage way on said bridge; and that it was also the duty of defendant to see that said insulation continued to be properly maintained so that persons crossing said bridge near said wires, or in proximity thereto, should not be injured by coming in contact with said wires, or any of them, at and near said point near the center of said bridge.

Yet, the said defendant, well knowing the premises, upon the day and year aforesaid, wholly disregarding its duties, and each of them, aforesaid, to the plaintiff's decedent, did, wickedly, carelessly, negligently and unlawfully without any notice to the plaintiff's decedent, suffer the wire aforesaid passing along and in dangerous proximity to said passage way on said bridge, near the center thereof at the easterly side thereof to sag and to be without proper insulation and protection at and near said point near the center at the easterly side of said bridge, and permitted the said wire at or near the center of said bridge near the easterly side thereof, to sag, to such an extent and to be so poorly insulated, or without insulation to such an extent that by means whereof, on the day and year aforesaid, the plaintiff's decedent, in crossing said bridge on the day and year aforesaid, in passing from said school house in, along said road to his home in said town, came in contact with said wire at or near said center of said bridge on the easterly side thereof, which wire was then and there

charged with a dangerous and deadly current of electricity, and plaintiff's decedent then and there by coming in contact with said wire, without any fault on his part, thereby received the electric current aforesaid into his body, by reason of which he was instantly wounded, hurt, and injured and became powerless to move himself away from the same and continued to remain in contact with said wire by reason of being powerless as aforesaid to move therefrom until such electric current had passed in and through his body to such an extent that he then and there died.

Plaintiff avers that the death of his decedent was caused by the negligence, carelessness and unlawful acts of the defendant aforesaid and its total disregard of its duties to plaintiff's decedent as aforesaid.

Plaintiff avers that his decedent, a boy of years of age, at the time of coming in contact with said wire of defendant, was passing from the said school house where he had been assisting his mother, the janitress of said school building, along said road to his home; that the time was about o'clock in the evening on the day and year aforesaid, and that the said decedent at the time of said injury and prior thereto, or at any other time, had no knowledge of the condition of the said wire as to its sagging and insulation, or either, and had no knowledge that the defendant had not performed the duties imposed upon it by law as aforesaid with reference to himself or any other person or persons crossing along said highway and over said bridge and in the proximity of said wire.

Wherefore, the plaintiff claims damages to the amount of dollars; and the demand of this suit claimed and sought to be recovered, is claimed and sought to be recovered on behalf of the mother of said decedent and his sisters, who are the sole heirs and distributees of said decedent as by law provided.

And thereupon plaintiff says that by reason of the premises, matters and things in said count mentioned, and by force of the statute in such cases made and provided, an action has accrued to him as such administrator as aforesaid, to have and demand of and from the said defendant, for and by reason of the said grievances, wrongs and injuries in said count mentioned, damages to the amount of dollars. And therefore he brings this suit.¹⁶³

1531 Bridge wires, insulation defective, Narr. (Md.)

For that heretofore, to wit, on the day of in the year 19.., the said defendant maintained, operated and controlled a system of wires in the city of

¹⁶³ Thornburg v. City & Elm Grove R. Co., 65 W. Va. 379 (1909).

Maryland, and in the village of in the election district of county aforesaid in said state, and upon a certain public bridge then and now spanning a navigable stream called creek in said county, which said bridge then and there connected said city of and said village of, and was and is, a public highway, which said wires were hung and suspended over and upon certain poles maintained and controlled by the defendant, upon and over the streets of said city and village and upon said bridge, for the purpose of doing a general electric light business in said city and village for hire, profit and reward to said defendant in that behalf; that it then and there was the duty of said defendant to use such care as is required by law to so control, operate and maintain said wires as to prevent the same from coming into contact with the pedestrians lawfully using and passing along the streets of said city and village and lawfully using and passing over the said bridge, which said bridge was then and there a public highway. Yet the said defendant, not regarding its duty in that behalf, did not use the care required by law to so operate, control and maintain said wires as to prevent the same from coming into contact with pedestrians lawfully upon and passing over said bridge as aforesaid, but on the contrary, carelessly and negligently failed so to do, and in disregard of its duty in that behalf carelessly, negligently, unlawfully and in disregard of the safety of pedestrians lawfully upon and passing over said bridge so maintained, controlled and operated its said wires on and over said bridge that the said wires became and were without proper insulation whereby, and by reason whereof, contact with said wires was dangerous to life, and which said dangerous condition of the said wires was then and there known to the defendant, and had been so known to the defendant for a long time previously to the injuries hereinafter complained of, to wit, for the period of weeks; and also the defendant knowingly, carelessly, and negligently suffered and permitted its said wires on said bridge to be and remain in said dangerous condition on said day of in the year 19..; and that by reason thereof the plaintiff on said day of in the year 19.., while lawfully using and passing over said bridge without any negligence on his part, came into contact with said wires, which said wires were then and there heavily charged with electric current, whereby he became and was greatly shocked and stunned and his life greatly endangered, and whereby also his hands were severely burned and injured and he was caused to suffer and did suffer great bodily pain and mental anguish. And the plaintiff claims therefor dollars damages.

1532 Poles; cross-arms defective, Narr. (Miss.)

Defendant is a public service corporation, chartered by the state of Mississippi and domiciled at and engaged

among other things, in the business of operating an electric lighting system in said city. It has its poles and wires in the various streets of the city, and has strung on said poles a great many wires, parallel to each other and also many connecting wires leading into the buildings along said street. These wires were used for various purposes, some for arc lights and for trolley wires carrying each of them a very heavy current or voltage of electricity sufficient to cause instant death if it should enter into one's body, some for motor fans carrying a less current but still sufficient to cause death from contact, others carrying a light and not dangerous current for the incandescent lights in the homes, stores and offices of consumers.

One of the defendant's poles is placed at the intersection of and streets, which is in the part of the business district, and on said poles there were a dozen or more wires. These rested on and were supported by cross-arms or wood fastened to the pole and which when properly constructed with due regard to the safety of the employees who might go on them in discharge of duty, are mortised into the pole and bolted to it securely braced by iron bars or rods running from either side of the cross-arm and connecting below the same at the pole to which they are securely bolted, or else the cross-arms are braced by wooden pieces, nailed or bolted to other cross-arms above or below on the same pole. The wires on said pole ran both east and west along street and also north along street thus necessitating several cross-arms running north and south and several running east and west, making a net work of wires. It was often necessary to adjust or repair these wires and their fastenings and make connections with them, and to do this, it was necessary for linemen or other employees of the defendant to climb up on pole and sit or stand on cross-arms. It was therefore necessary that these cross-arms be constructed and kept by the defendant securely braced and so firmly affixed to the pole and adjusted so that it would not turn under the weight of an employee sitting on it and reaching out from it, as it had to be done, in fixing wires, making connections or wrapping wires.

On the day of, 19...,, unmarried son of and a brother of the other plaintiffs was in the employ of the defendants as a lineman or member of its force in charge of the stringing and adjusting and repairing of wires and was ordered by his superior officer, the foreman of the linemen, to climb up on said pole and connect or adjust a wire thereon. In the discharge of this duty he was sitting on one of the cross-arms aforesaid and was reaching over to the wire in question, his feet resting on the cross-arm underneath when the cross-arm turned under him, causing

his hand or foot or both to fall, slip and come in contact with two live or charged wires in such a way as to short circuit the current through his body, causing instant death. Said was years old, was strong, healthy, vigorous, and earning and capable of earning to dollars per month, and having the expectancy of life of a healthy man of his age.

The cause of his death was the electrical current aforesaid entering his body, and the cause of that was the gross negligence of the defendants in the following respects: in failing to provide a safe place for said, its employee, to work, in this, that it failed to provide and maintain the usual and ordinary and necessary braces for said cross-arms, by reason whereof it turned under him while on it in the due and proper discharge of his duty causing contact with the live wires as above mentioned; in failing to properly insulate and to maintain insulation on its wires at and near the cross-arms so that the contact caused as aforesaid would be harmless; in not cutting off entirely, the current from said wires while being fixed and adjusted by said, so that the discharge of the said duty committed to him would be free from such danger; in not acquainting with the fact that the wires were dangerously charged and thus putting him on his guard to prevent all danger that might be and was by him incurred.

Plaintiffs are advised and say that by reason of the above mentioned gross negligence of the defendant and consequent death of said, plaintiffs' parents and said decedent's only brothers and sisters are entitled to recover of the defendant all damages of every kind to the decedent and all damages of every kind to any and all parties interested in this suit. These damages amount to a large sum, to wit, dollars for which sum plaintiffs sue and demand judgment with interest and costs.

1533 Poles defective, action

A telephone company is not liable for an injury sustained by one of its linemen caused by the falling of a rotten pole, which the lineman was bound, by the telephone company's rules, to inspect and test before climbing.¹⁶⁴

1534 Poles; guards lacking, Narr. (Ill.)

For that whereas heretofore, on, to wit, the day of, 19.., the defendant, D, was a corporation and

¹⁶⁴ De Frates v. Central Union Telephone Co., 243 Ill. 356, 360 (1910).

as such owned, controlled and operated certain lines of telegraph wires and poles and other apparatus necessary for the maintenance and operation of said telegraph lines in and through the county of and state of Illinois, and the defendant, M, at the time hereinafter mentioned was a corporation and as such owned, controlled and operated a certain line of electric railway in and through the county of and state of Illinois, together with the tracks, wires and poles necessary for the operation of said railway and the transmission of electric power used in operating its cars and motors over and upon said railway; that, on, to wit, the time aforesaid, the defendant, D, was, with the knowledge and consent of M, engaged in stringing and attaching certain wires to and upon a certain arm attached to a certain pole which said arm and pole were owned by M and were situated, to wit, on or near avenue, near the, at,, county, Illinois; and that, on, to wit, the time and place aforesaid, the said plaintiff was in the employ of the defendant, D, as a lineman, and while in the exercise of ordinary care and caution for his own safety, plaintiff was ascending said pole for the purpose of stringing and attaching said wires to the said arm of said pole, said defendants, and each of them, then and there carelessly and negligently failed to furnish plaintiff a safe place in which to do said work and to warn plaintiff of hidden and unseen dangers incident to said work there, whereby plaintiff then and there came in contact with a certain wire or wires suspended across and attached to a certain arm on said pole, which said pole, arm and wire or wires last aforesaid, were owned, controlled, and operated by said defendant M, and said wire or wires were heavily charged with electricity, exposed and uninsulated, and said defendants, and each of them, well knew, or by the exercise of ordinary care might have known, that said wires were so heavily charged, exposed, uninsulated and dangerous, and were unknown to the plaintiff, but said defendants, and each of them, then and there carelessly and negligently failed to insulate said wire or wires last aforesaid, or otherwise protect and warn plaintiff of the danger of coming in contact with said wire or wires, and that by and in consequence of the joint and concert careless and negligent conduct of said defendants in that behalf, as aforesaid, plaintiff was then and there severely and dangerously and violently shocked and burned.

2. That, on, to wit, the time and place aforesaid, and while the plaintiff was in the necessary discharge of his duties, the foreman of the defendant, D, who was then and there in authority over plaintiff, carelessly and negligently ordered plaintiff to ascend said pole for the purpose of stringing and attaching said wires to said arm on said pole, and while plaintiff, in the exercise of ordinary care and caution for his own safety, was ascending said pole pursuant to the order of said foreman, to

string and attach said wires, as aforesaid, the plaintiff then and there came in contact with a certain other wire or wires, heavily charged with electricity, exposed, uninsulated and dangerous, that were suspended across and attached to a certain other arm on said pole, which said arm, pole and wires last aforesaid, were owned, controlled and operated by defendant M, and said defendants and each of them well knew, or by the exercise of ordinary care might have known, that said wires, last aforesaid, were heavily charged with electricity, exposed, uninsulated and dangerous, but which was unknown to the plaintiff, and the defendant M well knew, or by the exercise of ordinary care might have known, that the foreman of the defendant D would order plaintiff to ascend said pole for the purpose aforesaid, and said defendants, and each of them, carelessly and negligently failed to insulate said wire or wires, last aforesaid, or otherwise protect and warn plaintiff of the danger of coming in contact with said wire or wires, and by and in consequence of the joint and concert careless and negligent conduct of the defendants in that behalf, as aforesaid, plaintiff was then and there and thereby severely and dangerously and violently shocked and burned.

3. That, on, to wit, the time and place aforesaid, while plaintiff, in the exercise of ordinary care and caution for his own safety, was ascending said pole for the purpose of stringing and attaching said wire to an arm of said pole, it became and was necessary for plaintiff to ascend above a certain other wire or wires heavily charged with electricity, exposed, uninsulated and dangerous, and were suspended across and attached to a certain other arm on said pole, which said arm was attached to said pole below the arm to which plaintiff was to string and attach the wire aforesaid, and which were owned, controlled and operated by defendant M, and said defendants, and each of them, well knew, or by the exercise of ordinary care might have known, that said wires last aforesaid were heavily charged with electricity, exposed, uninsulated and dangerous and were unknown to plaintiff, and the defendants and each of them carelessly and negligently failed to have said pole stencilled, or to have signs of danger on said arm or pole so as to warn plaintiff of hidden and unforeseen peril and danger, and to warn plaintiff so that he might avoid coming in contact with said wire or wires, which were heavily charged with electricity, exposed, uninsulated and dangerous, and the defendants and each of them carelessly and negligently failed to insulate said wire or wires last aforesaid, or otherwise protect or warn plaintiff of the danger of coming in contact with said wire or wires, and by and in consequence of the joint and concert careless and negligent conduct of the defendants, as aforesaid, plaintiff was severely and dangerously and violently shocked and burned.

By reason whereof plaintiff was then and there severely and

dangerously shocked, burned, cut, bruised, strained, wounded, and injured both internally and externally, and plaintiff's back, spine, brain and nervous system were then and there and thereby severely and permanently and dangerously injured, and divers bones in plaintiff's limbs were thereby then and there fractured and broken, and plaintiff's left arm was then and there and thereby severely shocked, bruised and burned so that amputation thereof became and was necessary and was performed, and plaintiff was otherwise severely, dangerously and permanently injured, internally and externally. That on account of said injuries, caused as aforesaid, plaintiff became sick, sore, lame and disordered and so remained for a long space of time, to wit, from thence hitherto, during which time he suffered great bodily pain and mental anguish, and still is suffering intensely and is languishing in body and in mind and in the future will continue to suffer from the effects of said injury, caused as aforesaid, and will be crippled and maimed for the rest of his natural life, and was thereby rendered impotent for the rest of his natural life, and on account of said injuries his mind has been severely impaired and injured. That on account of said injuries caused as aforesaid, and the sickness resulting therefrom, plaintiff was compelled to, and did pay out and become liable for the payment of large sums of money for doctors' bills, drugs, medicines, nursing, care and attention in and while attempting to cure himself and to be cured of the wounds, bruises, and injuries as aforesaid, and was compelled to, and did expend and become liable for the payment of large sums of money in and while procuring and hiring others to do work for him which prior to receiving said injuries he could and did do for himself. That prior to said injuries plaintiff was a man of good health, strong and robust, and his services were of the value of and he could and did earn, to wit, (\$.....) dollars per month, but that since said injuries and as a direct result thereof he has been unable to do any work or to earn anything whatever or to transact any business, and has on account of said injuries been hindered and prevented from saving and accumulating divers large sums of money and divers great gains and profits which he could have otherwise earned, saved and accumulated, to the damage of the plaintiff in the sum of (\$.....) dollars, and therefore he brings his suit, etc.

b

For that whereas, heretofore, on, to wit,, 19.., and for a long space of time prior thereto, to wit, for the space of years, at, to wit, the county aforesaid, the defendant was possessed of and using a certain street railway extending in and along parts of street in the city of from street south to avenue which railway over said street it operated by means of electricity carried over head on cables supported by

poles, and which said railway and use of said parts of said street aforesaid it acquired from the, subject to all the duties and obligations of the latter as to said parts of said street to the city of and those using said street or any parts thereof, amongst which was the duty imposed by an ordinance of said city passed by the city council thereof,, 19., and approved by the mayor of said city,, 19., and accepted by said on, 19., in words and figures as follows, to wit: (Set out acceptance) and which ordinance was duly published by said city and now appears on page,, and of the book entitled, published section, which ordinance reads as follows, to wit: (Set out ordinance).

Whereby it became and was the duty of said and the defendant as its successor to stretch and maintain a suitable guard wire along and above its electric cable on said street at the intersection thereof with the north line of street and for a short distance south thereof as then and there were on, 19., and continued to be until, 19., other wires belonging to other companies amongst which were those of the, suspended above the electric cables of defendants street railway company running east and west over the said point or place aforesaid; yet, the defendant neglecting its duty in that behalf failed and neglected to stretch or maintain a suitable guard wire above its said cable at the place aforesaid.

By reason whereof the plaintiff in the course of his duty, as an employee of the said, in stretching and taking down and handling wires of said latter company crossing over said overhead electric wires and cable of defendant at the place aforesaid, on, to wit, the day and year last aforesaid, while in the exercise of due care and caution for his own safety, by reason of one of the wires of said, on which he was working breaking and falling down upon the said overhead wire or cable of said defendant which latter was then and there charged with electricity, the current of electricity was conveyed therefrom by said fallen wire to the net work of wires where plaintiff was necessarily standing and working, in the performance of his duties aforesaid; and said electric current was thereby then and there carried into and against his body and person and he was thereby then and there badly burnt on his breast and right arm, his left knee, right leg below the knee, his right hand and back, and his left testicle so badly burnt that it had to be removed by an operation; and thereby and by means thereof the plaintiff then and there became and was sick, lame, and disordered and so remained for a long space of time, to wit, from thence hitherto, during all of which time plaintiff suffered great pain and was hindered and prevented from transacting and attending to his

business, work and affairs and lost and was deprived of divers great gains and wages that he might and otherwise would have made and acquired, and he is permanently injured and crippled; and also thereby the plaintiff was obliged to and did then and there incur divers large sums of money for hospital and hospital charges, nurses, nursing, and medicine and medical attendance, to wit, the sum of dollars in endeavoring to be cured and healed of the said wounds and injuries so received as aforesaid. To the damage, etc.

(Virginia)

For this, to wit, that heretofore, to wit, on or before the day of, 19.., the company of Virginia maintained, operated, and controlled a certain system of wires and cables in the city of in the state of Virginia upon, over and along a certain street in said city called and known as avenue, which wires and cables were strung and suspended on and along certain poles of said company and which wires, cables and poles were so maintained and controlled by said company upon, over and along said avenue for the purpose of doing a general telephone and telegraph business in said city, in pursuance of authority already theretofore granted said company by said city for that purpose, and by virtue of said authority, and in the prosecution of its said business, said company had the legal right to and did from time to time have its agents, servants and employees to go up and upon said poles and perform work on its said wires, cables and poles, removing and changing old wires and cables and erecting on said poles new wires and cables and doing such other work on said wires, cables and poles as pertained to its said business; and while its said agents, servants and employees were so upon said wires, cables and poles and engaged in work thereon for said company, they were lawfully upon said wires, cables and poles and were lawfully so engaged in work thereon.

And the plaintiff says that his intestate, the said , heretofore, to wit, on the day of, 19.., at the special instance and request of the said company of Virginia was engaged in working for hire for said company on its said poles, cables and wires strung as aforesaid along, over and upon said avenue and in the prosecution of his said work for said company, it became necessary for plaintiff's intestate, at the special instance and request of to go on the said poles, cables and wires of said company and work upon and handle its said wires and cables.

And the plaintiff says that heretofore, to wit, on and before the day of, 19.., the said defendant erected, placed, maintained, operated and controlled a certain

system of wires in said city on, over and along said street called and known as avenue, which wires were hung and suspended over, along and upon certain poles of the defendant, and which said poles and wires of the defendant were so erected, placed, maintained, operated and controlled by said defendant, on, over and along said for the purpose of doing a general electric light and power and street railway business in the city of for hire, profit and reward to said defendant in that behalf; and said wires of the defendant were practically parallel with and over the said wires and cables of said company of Virginia and the said poles of the said defendant and of the said company of Virginia supporting their respective wires and cables were practically in a line with each other; and said wires of the defendant were near said wires, cables and poles of said company of Virginia and were from time to time heavily charged with a dangerous current of electricity which was being transmitted by the defendant over and along them, and the said defendant knew or by the exercise of the care required of it by law in such cases could have known that the employees of the said company of Virginia while lawfully engaged in work on the said poles, cables and wires of said company of Virginia had necessarily to come in close proximity to, and were liable to come in contact with said wires of the defendant while so charged with a dangerous current of electricity and by reason of such contact were liable to be killed or suffer bodily hurt.*

And thereupon it became and was the duty of said defendant to use such care as was required by law to so erect, place, locate, operate, control, protect, guard, maintain and properly insulate its said wires and to so warn plaintiff's intestate as to prevent injury to him from coming in contact with its said wires when charged with a dangerous current of electricity while he was lawfully on or working for said company on its said wires, cables and poles, erected, located and maintained as aforesaid and while he was lawfully in proximity to said wires of the defendant.

Yet the said defendant, not regarding its duty in that behalf, carelessly, negligently and unlawfully failed to protect and properly insulate one of its said wires on, over and along said avenue, which wire was, as above set out, in close proximity to said wires, cables and poles of the company of Virginia, and was covered with insulating material and was to all outward appearance properly and sufficiently insulated and seemingly harmless to anyone coming in contact therewith while charged with a dangerous current of electricity, but the insulation of which, though intact, or apparently intact and with no visible break or abrasion therein was

in reality totally insufficient and inadequate to prevent injury to any one coming in contact with said wire while so charged with a dangerous current of electricity if he should happen at the same time to be "grounded," and there was nothing in the appearance of said wire or the insulation thereof from a visual examination thereof to indicate the danger in so coming in contact therewith; and carelessly, negligently and unlawfully erected, placed, located, operated, controlled and maintained said wire in the condition above set out, so near to said wires, cables and poles of the company of Virginia as that anyone working on the latter company's said wire, cables and poles had naturally, necessarily and inevitably to come in close proximity to and was liable at any time to come in contact with said wire of the defendant; and carelessly, negligently and unlawfully failed to guard said wire and to warn plaintiff's intestate of the danger in coming in contact therewith while in the condition, location and position above set out.

2. (Consider first count to star as here repeated the same as if set out in words and figures.) ,

And also the plaintiff says that at and before the time of the commission of the grievances hereinafter set forth there was in effect a legal and valid ordinance, of the said city of , a municipal corporation in the state of Virginia, providing that no person, firm or corporation should construct or maintain in or over the streets of the said city any defective or any improperly installed or improperly located wires or electric apparatus.

And thereupon it became and was the duty of said defendant not to construct or maintain in or over any street of said city any defective or improperly installed or improperly located wires or electric apparatus in such manner as to endanger persons lawfully coming in proximity to or touching its said wires.

Yet, the defendant, not regarding its duty in this behalf, carelessly, negligently and unlawfully constructed and maintained in and over one of the streets of said city called avenue, near its intersection with avenue one of its said electric wires, which was in close proximity to said wires, cables and poles of the company of Virginia, and which was defective and improperly installed, in that, though said wire was covered with insulating material and to all outward appearance properly and sufficiently insulated and seemingly harmless to anyone coming in contact therewith while charged with a dangerous current of electricity, the insulation being intact and with no visible abrasion or bare place, and nothing to indicate from a visual examination thereof the latent danger therein, yet such insulation was in reality totally insufficient and inadequate to prevent injury to anyone coming in contact with said wire while so heavily charged if he should happen at the same time to be

"grounded." And the plaintiff says that said wire was also improperly located by reason of the fact that while so heavily charged and improperly insulated, it was placed and allowed to remain by the defendant so near to the said poles, wires and cables of the company of Virginia, that anyone working for the last mentioned company on its poles, wires and cables was liable to come in contact with and be shocked by said wire of the defendant.

3. (Consider first count to star as here repeated the same as if set out in words and figures.)

And also the plaintiff says that before and at the time of the commission of the grievances hereinafter set forth there was in force and effect a legal and valid ordinance of the city of which required that the city electrician of said city should direct, regulate and determine the placing, operation and maintenance of electric wires in the city of and that he should cause all such wires to be so placed, constructed, guarded, insulated and maintained as not to cause accidents endangering life or property. And the defendant, its agents and employees were aware of the existence and binding force of said ordinance and had been directed by the city electrician of said city to so place, construct, guard, insulate and maintain its said wires in said city as not to cause accidents, endangering life or property.

And thereupon it became and was the duty of said defendant to so place, construct, guard, insulate and maintain its said wires in said city as not to cause accidents endangering the life of any person lawfully coming in proximity to or touching its said wires.

Yet, the defendant not regarding its duty in the premises, negligently, carelessly and unlawfully placed, constructed and maintained and failed to insulate and guard one of its said wires over and along said avenue near its intersection with avenue, the same being then and there in close proximity to said wires, cables and poles of the company of Virginia, and being then and there heavily charged with a dangerous current of electricity, to wit, volts, being so conducted as aforesaid by it along, through and over the same, in such a way as tended, naturally and almost inevitably, to cause accidents endangering life, in this that said wire was covered with insulating material with no visible abrasion and seemingly intact, and to all outward appearance sufficiently protected to prevent anyone from being shocked by the current of electricity passing through it, should he touch said wire, but in reality said insulation was totally insufficient to prevent accidents endangering the life of one touching the same, while so charged with a dangerous current of electricity; and in this also that said wire was placed, constructed and maintained by the defendant in the condition it was as above set out, so near to said

wires, cables and poles of said company of Virginia as that anyone working on the latter company's said wires, cables and poles had naturally to come in close proximity to and was liable at any time to come in contact with defendant's said wire; and in this also that said wire in the condition it was as above set out and placed, constructed and maintained by the defendant as above set out, was not properly guarded by the defendant, as required by said ordinance.

And the plaintiff says that his intestate, the said heretofore, to wit, on the day of, 19.., at the city aforesaid, while lawfully on one of the poles of his employer, the said, on said avenue near its intersection with avenue and engaged in working for his said employer, standing on one of its said cables which was attached to said pole and working on another of its said cables which he was fastening to the cross-arm of the said pole, relying, as he had the right to do, on the proper observance by the defendant of said ordinance, and presuming as he had a right to do, that the said insulation of the defendant's said wire, which was immediately above him and so near him that it would easily come in contact with him in the proper prosecution of his said work, would be a protection against his being shocked by the current of electricity passing through it, should he come in contact with it, and he being at the same time inexperienced in electrical work involving such latent dangers as are hereinbefore recounted, and without any knowledge of such latent dangers, and relying as he had a right to do on the assumption that the defendant, having so insulated its said wires, would protect and had protected the same from all such hidden and latent dangers, and without any previous warning by the defendant of the danger in so coming in contact with the same should he at the same time be "grounded," without any negligence on his part, and with no knowledge of the danger in touching said wire, came in contact with said wire of the defendant, which was then and there heavily charged with a dangerous current of electricity, to wit, volts, being so conducted as aforesaid by the defendant by, through and over the same, and which was not properly insulated, whereby and by reason of the negligent and unlawful conduct of the defendant as above set out he was shocked, stunned, burned and otherwise injured by said current of electricity and caused to fall from said pole to the ground, from which injuries and fall he suffered great and intense mental and physical anguish and pain, to wit, for about hours, and then and there died. Wherefore, etc.

1535 Transformer, defective, consumer injured, Narr. (D. C.)

For that heretofore, to wit, on defendant was, and for a long time prior thereto had been engaged in operating a plant in the District of Columbia in which electric current was generated, and was the owner of certain wires and conduits used for the purpose of conducting the said electric current so generated from said plant to divers buildings, in the District of Columbia, and was by means of said plant, electric current, conduits and wires engaged in furnishing light and power to, among many other places, the premises number avenue northeast in said District, and that the said defendant used a certain machine or instrument known as a transformer, for the purpose of reducing the current that was being carried over one of its wires running along its conduit on street northeast near street in said District, from a voltage of, to wit, to, and that said electric current of volts was to be carried into the said premises number avenue northeast for the purpose of lighting said premises; but the plaintiff says that regardless of its duty in the premises, the defendant negligently and carelessly caused and allowed the installation of a defective transformer at said place on street northeast near street, and that on, to wit, the day and year aforesaid said transformer by reason of this defective condition, failed to reduce the said high voltage, and instead of the proper electric current of volts being carried into the said premises avenue northeast, the full power of electric current running along the said wire in said conduit on said street northeast near street, to wit, a voltage of was carried into the said premises over a certain wire or wires installed by said defendant; and that on account of said negligence a dangerous condition was caused to exist in said premises without the knowledge of the plaintiff's intestate. That the plaintiff's intestate on the said day of being lawfully on the premises, did, while using all due care and without fault or negligence on his part, then and there touch and come in contact with a certain wire so negligently charged by said defendant with a high voltage, or electric current, and thereby received an electric shock which caused the death of plaintiff's intestate hour after said contact and shock; and the plaintiff avers that the said intestate left surviving him his widow and as his only next of kin, his infant son of the age of years, both of whom were dependent upon plaintiff's intestate for support, and both of whom have suffered damages by reason of the plaintiff's said intestate, injury and death, as aforesaid. That by reason of the statute in such a case enacted the

plaintiff is entitled to recover damages from the defendant for the benefit of the next of kin and the widow of said intestate. Wherefore, etc.

1536 Transformer defective, inspector injured, Narr. (Ill.)

For that whereas, on, to wit, day of
, 19.., the defendants did possess, maintain and operate in the city of, and said county, a system of electric lights and electric street railways for which the electricity was generated at a single powerhouse and conducted by means of wires of various electrical currents of electricity, some of the currents, being of greater strength, force and intensity than others, were conveyed from the powerhouse to various points in the said city, and it did operate, manage and control a certain electric light, street railway and power plant, with its machinery, dynamos, wires and appliances in said city. That the said defendants, at the time aforesaid, had a large number of other wires and appliances which carried a very high current of electricity that was fatal to human life, in close proximity to a certain hereinafter mentioned wire; and knowing the danger in case the said higher and deadly current of electricity came upon a lower or secondary wire, the said defendants did adopt, install and maintain an appliance or device, the use of which is usual and customary in said electrical business, known as a fuse block or plug connected with said secondary wire; that said fuse block or plug was a device made out of fuse wire, the object and purpose of which was to prevent a high and deadly current of electricity in case it came upon said secondary wire from reaching the place where it was the duty of to take hold of the same; that when properly, customarily and safely attached, installed, maintained and adjusted, the said fuse block or plug will prevent a high and deadly current of electricity from going over a secondary wire, the said high and deadly current in such cases burning out the said fuse block or plug wire, thereby disconnecting the secondary wire from any current whatever; of all of which said defendants had knowledge. That by means of a wire known as a primary wire a very powerful current of electricity and one which is dangerous to human life, was conveyed by the said defendants from their power house to an instrument known as a transformer, the object and purpose of said transformer being to modify and lessen the character and strength of the said current of electricity and make it of a character that would not be dangerous to human life, and to transmit the said modified and lessened current of electricity through a wire known as a secondary wire to the hereinafter mentioned incandescent light. That a certain wire which terminated in a bulb containing an incandescent light was connected with and was a part of a certain

circuit known as a secondary circuit, which said secondary circuit supplied a large number of incandescent lights with electricity besides the one first mentioned; that the current of electricity which usually and customarily passed through the said secondary circuit was not strong enough to be dangerous to a person taking hold with his hand of a wire at any place in said secondary circuit.

And that at the time aforesaid the said was in the employ of defendants as a car inspector, cleaner and repairer in the night time and was there at the time aforesaid actively engaged at work in the car barn of the said defendants; that at the time and place aforesaid it was customary and usual for the said in the discharge of his duties as car inspector, cleaner and repairer as aforesaid to take hold with his hands of said wire which terminated in said bulb, containing an incandescent electric light, for the purpose of carrying the electric light bulb around in and about making the inspection as aforesaid; all of which was known to the said defendants, or could have been known to them by the exercise of ordinary care.

And it then and there became and was the duty of the said defendants to keep the said wires safely, securely and completely insulated so that said, while in the exercise of reasonable care, should not be injured by contact therewith; but that the said defendants, notwithstanding such knowledge, and disregarding its duty in the premises, carelessly and negligently maintained the said wires and carelessly and negligently protected the same by defective insulation, and carelessly and negligently failed to protect and cover said wires with safe or sufficient insulating material, and carelessly and negligently permitted the covering used thereon to become worn, defective and wholly insufficient to render it safe for persons coming in contact therewith.

And it also then and there became and was the duty of the said defendants to keep the said transformer in such repair and safe and secure condition as that the said while in the exercise of due care should not be injured by contact with the said wires while in the performance of his said duty; but that the said defendants, notwithstanding its knowledge and disregarding its duty in the premises, carelessly and negligently maintained the said transformer in a dangerous, defective and unsafe condition, whereby it did not properly modify and lessen the said powerful current of electricity.

And it also became and was the duty of the said defendants to so maintain and operate their system of dynamos, wires and electrical transmission that the said, while in the exercise of due care should not be injured by contact with the said wires while in the performance of his said duty; but that the defendants, notwithstanding their knowledge, and disregarding their duty in the premises, while the

said held said wire terminating in an electric light as aforesaid in his hands while in the course of his duty as aforesaid, carelessly and negligently maintained their system of wires in a dangerous, defective and unsafe condition and carelessly and negligently maintained their said wires, and carelessly and negligently protected the same by defective insulation, and carelessly and negligently failed to protect and cover said wires with sufficient insulating material and carelessly and negligently permitted the covering used thereon to become worn, defective and wholly insufficient to render them safe, whereby another of defendants electrical wires became crossed with the said wire ending with the said electric light and thereby caused a different kind of a current and a stronger and more dangerous current of electricity to pass through the said wire ending in the electrical light.

And that, also, certain wires of said defendants which passed over said car barn in which said was working at the said time, were negligently, carelessly and defectively built, constructed and maintained and were at the said time in an unsafe and dangerous condition, by reason whereof a primary wire of defendants, carrying a high voltage current was in such near proximity to a secondary wire of defendants which supplied the said incandescent electric light and wire of defendants aforesaid described, carrying a low voltage current, so that the electrical current that passed through the said secondary wire became and was of a higher voltage and by reason thereof said electrical current passing through the said secondary wire was dangerous and fatal to the life of the person taking hold of said secondary wire with his hands at a point about one foot from the said incandescent light; which said condition was known to the said defendants or could have been known by the exercise of ordinary care.

And it also became and was the duty of the said defendants in putting in place the said wires and in connecting them with the said transformer to do and perform the same with usual and customary precautions against the coming together of said primary and secondary wires; but that said defendants notwithstanding their knowledge and disregarding their duty in the premises carelessly neglected to take such precautions against the coming together of said primary and secondary wires as are usual and customary, and carelessly and negligently put up and placed the said wires and connected them with the said transformer and maintained them so that the said primary and secondary wires were crossed and within a short distance of each other and thereby became and were unsafe and dangerous to the said

And it also became and was the duty of the said defendants to adopt, install, adjust and maintain a fuse block or plug of such character and in such good and safe condition as would prevent a high and deadly current of electricity in

case it came upon said first mentioned wire from reaching the place where as aforesaid it was the duty of the said to take hold of the same; yet, the said defendants well knowing the premises and carelessly neglecting to provide the said first mentioned wire with the usual safe fuse plug or block, did, to wit, on the day aforesaid, carelessly and negligently install and adjust and did carelessly and negligently maintain the said fuse plug or block in such unsafe and dangerous condition as to permit a high and deadly current of electricity to pass over the said first mentioned wire.

And it also became and was the duty of the said defendants to inform the said of said high and deadly current of electricity passing through said secondary circuit; yet, the said defendants, not regarding their duty in that behalf, while they were so managing, operating and controlling said machinery, dynamos, wires and appliances carelessly and negligently neglected to inform the said of said high and deadly current of electricity passing through said secondary circuit.

And that by means whereof, at the time and place aforesaid, while in the discharge of his duties as aforesaid, and in the exercise of ordinary care, said took hold with his hand of said first mentioned wire about one foot from the said incandescent electric light on the end of said wire, which was a part of said secondary circuit as aforesaid and received a shock from a high and deadly current of electricity which was passing through said wire at the same time, and thereby received said electrical current through his body and was then and there killed. (Add last two paragraphs of Section 1495)

1537 Wire conductors uninsulated, Narr. (Ill.)

For that whereas on and before the day of , 19.., and during the lifetime of said decedent, the defendant was possessed of, maintaining, using and controlling a system of wire conductors within the corporate limits of said village of, extending over, above and along certain of the public streets of said village and supported by upright poles and which said system of wire conductors was so possessed, maintained, used and controlled by the defendant for the purpose of conducting and transmitting an electric current to certain electric lamps of the defendant located and suspended above and along certain of the public streets of said village and supplying for hire electric light to such of the citizens of said village as were using electric lamps; and pursuant to such purpose the defendant then had one of its wire conductors suspended overhead at or near the intersection of and streets in said village, heavily charged with electricity, which said wire conductor was supported by a wooden arm, to wit, eight inches in length

attached to and extending from a certain upright pole there at a height of, to wit, feet from the surface of the street there, and which said upright pole was stayed and braced by a certain uninsulated wire fastened to said upright pole at a point near to and immediately beneath said wooden arm and wire conductor there and extending therefrom over and across a certain sidewalk there within easy reach of persons passing upon and along said sidewalk and street there to and encircling and attaching to a certain post there, said post in said street then at a point, to wit, feet from the surface of the ground there within easy reach of persons passing thereby and, to wit, feet from the outer edge of the sidewalk there.

And it then and there became and was the duty of the defendant to have and keep said wire conductor properly and completely insulated and properly adjusted and safely supported on said wooden arm and said wooden arm firmly and securely attached to said upright pole so that said wire conductor would not fall down and upon said uninsulated wire and thereby transmit and conduct a deadly current of electricity to and through said uninsulated wire, thus endangering the lives of persons passing upon and along the sidewalk.

Yet, the defendant not regarding its duty in this behalf knowingly, carelessly, negligently and wantonly permitted said wire conductor to be and to become and remain illy, imperfectly and defectively insulated and said wooden arm supporting said wire conductor as aforesaid to become and remain loose and unstable upon said upright post, by reason whereof said wire conductor fell to and upon said uninsulated wire then and there discharging and conducting into and through said uninsulated wire a deadly current of electricity and which said wire conductor imperfectly and defectively insulated as aforesaid the plaintiff avers the defendant carelessly, negligently and wantonly permitted to rest upon and be and remain in contact with said uninsulated wire there for a long space of time prior to the time of the death of said decedent, to wit, days prior thereto; and while the decedent was then and there walking upon and along the said sidewalk and said street with all due care, caution and diligence for his personal safety he, said decedent, came in contact with said uninsulated wire there charged as aforesaid with a deadly current of electricity which passed to and through the body of the decedent and thereby said decedent was then and there instantly killed. (Add last two paragraphs of Section 1495)

1538 Elevator, apartment building, action

A landlord who in renting different parts of his building to various tenants reserves the elevators, halls, stairways or other

approaches for their common use, is under an implied duty to keep these places in a reasonably safe condition, and is liable to persons who are lawfully in the building and who are injured as a result of a failure to perform that duty.¹⁶⁵

1539 Elevator, appliances and construction defective, Narr. (Ill.)

For that whereas the defendant in the lifetime of the said T was, and still is a corporation organized and existing under and by virtue of the laws of the state of, and then and there, to wit, at the city of, in the said county of and state of Illinois, on, to wit, the day of, 19.., in the city, county and state aforesaid, did maintain, conduct, operate, possess and carry on its certain business of the retail dry goods store in a certain building, structure or premises commonly called and known by the name of C, situated, to wit, at the corner of and streets, in the city, county and state aforesaid; that prior to, and, on, to wit, the day of, 19.., the said defendant, D, in connection with their said retail dry goods business at the place aforesaid did maintain, possess and operate a certain ascending and descending mechanical contrivance or car commonly called and known by the name of, to wit, an elevator, and elevator shaft and machinery for the purpose, *inter alia*, of carrying and conveying from floor to floor of said building or structure passengers and patrons of said defendant company; that prior to, and on, to wit, the day of, 19.., the said T was employed as an elevator operator or conductor by the said defendant in its said building situated in the city and county aforesaid, and that while the said T was engaged in the performance of his said duties as elevator conductor, and while the said T was in the exercise of all due care and diligence for his own safety, and in the usual and ordinary course of his business and occupation as such employee of said defendant, and while the said T in the usual and ordinary course of his employment was operating the said car at the floor of said building or structure, nevertheless the said defendant, well knowing the premises and regardless of its duty therein, negligently, carelessly and improperly constructed said elevator with defective appliances, stops, brakes, rests, safeties, dogs or grabs to catch the elevator going up or down, without sufficient cables and cable attachments and connections, without a sufficient automatic safety governor to control the moving power; negligently, carelessly and improperly failed, neg-

¹⁶⁵ *Mueller v. Phelps*, 252 Ill. 630, 633 (1912).

lected and omitted to keep and maintain said elevator, its shaft and machinery in a safe and secure condition; and carelessly, negligently and improperly allowed, suffered and permitted said elevator shaft and machinery to be and become out of repair and in an unsafe and dangerous condition in this, that the connection of said elevator with its controlling cable was defective and improper and worn out and the appliances for stopping and controlling its operation were out of order and defective; and the defendant by its servants then and there negligently and carelessly failed and neglected to keep said emergency devices designed to be used to stop the same when accidents happened to said elevator shaft or machinery in a safe and secure condition; and it also became and was the duty of said defendant to use reasonable care and diligence to keep and maintain the said elevator and elevator shaft, its appurtenances and surroundings and machinery in a reasonably safe and secure condition and state of repair in order that no injuries should accrue to the said T by reason of any default of the defendant in the premises.

Yet, the defendant, wholly disregarding its duty in that behalf at the time aforesaid and at the place aforesaid, and whilst the said T was rightfully, and with reasonable care for his own safety, operating the said elevator at the floor of said building, carelessly, negligently, wrongfully and improperly permitted and allowed the said elevator and its machinery, its stops, brakes, rests, safeties, dogs or grabs to catch the elevator going up or down to be and become out of repair and in an unsafe and dangerous condition.

2. That also, while the said T was engaged in the performance of his said duties as elevator conductor, and while the said T was in the exercise of all due care and diligence for his own safety, and in the usual and ordinary course of his business and occupation as such employee of the said defendant, and while the said T in the usual course of his employment was operating the said elevator or car at, to wit, the floor of said building or structure, nevertheless the said defendant, well knowing the premises and regardless of its duty therein, negligently, carelessly and improperly constructed said elevator in this, that the cage or car of said elevator was constructed with a large heavy beam at the top of said cage or car, to which said beam were attached, to wit, certain cables and other devices for the operation of said car; that the braces, bolts and fastenings by which the said cage or car was attached to the said beam, were frail and insufficient, or that the said cage or car was of itself of such light construction as to be insufficient to support the weight of said beam, or to safely attach said beam to the said cage or car; that the said elevator was constructed with defective appliances, stops, brakes, rests, safeties, dogs or grabs, to catch or hold the said elevator going up and down, was without sufficient cables or cable attachments

or connections, was without sufficient automatic safety governor or other safety devices for the reasonably safe operation of said car; that the defendant negligently, carelessly and improperly failed, neglected and omitted to keep and maintain said elevator, its shaft and machinery in a safe and secure condition, and carelessly, negligently and improperly suffered and permitted said elevator car, cage, shaft and machinery to be and remain in an unsafe and dangerous condition; that the defendant permitted said elevator to be operated in its unsafe and improper construction, and permitted the appliances for stopping and controlling the operation of said elevator to be out of order and defective, and permitted the said safety appliances or devices for stopping the said car in cases of emergency to remain in an insufficient, unsafe and unsecure condition.

3. And that it also became and was the duty of the said defendant to furnish and provide an inspector for the purpose of inspecting the condition of said elevator shaft and machinery; that it became and was the duty of said defendant to properly inspect said elevator and machinery; but that the defendant, not regarding its duty in this behalf, carelessly, negligently and improperly failed to properly and sufficiently inspect the same.

But the said defendant wholly disregarded its duty in that behalf and permitted the said elevator or car operated by the said T to become and remain unsafe and insecure, and permitted said elevator or car to be operated by the defendant while in such unsafe and insecure condition.

By means whereof, whilst the said T was aboard said car in the performance of his duties as said elevator operator or conductor aforesaid, and in the exercise of due care and caution for his own safety, the said car or cage whilst descending from, to wit, the floor of said building, fell, broke and parted from its fastenings and machinery and was precipitated with great force and violence to and upon the bottom of said elevator shaft, and the said plaintiff's intestate was then and there thereby crushed, bruised, maimed and wounded as a result, whereof the said T died. (Add last two paragraphs of Section 1495)

1540 Elevator shaft unguarded, Narr. (D. C.)

For that whereas, at the time of the grievances hereinafter mentioned, the defendant was in possession and control of a certain hotel in the city of, called the, in which hotel the defendant then and there owned, controlled and operated a certain elevator, which was then and there used as a passenger elevator for the purpose of carrying guests and inmates of the said hotel from floor to floor; and that it then and there became and was the duty of the defendant to have said elevator provided with safe and proper

appliances and appurtenances and to have and keep the shaft in which said elevator was run so protected and enclosed as to render the use of said elevator safe and proper for guests and inmates of the said hotel; but that the defendant then and there neglected its duty in that regard, in this, that upon one of the floors of said hotel a certain door or opening into said elevator shaft was negligently allowed to remain open and unprotected so that the plaintiff while a guest and inmate of said hotel, as aforesaid, on, to wit, the day of, and while he was in the exercise of due care on his part, fell through the said unprotected, and uninclosed door or opening into said elevator shaft and was projected with great force and violence to the bottom of said shaft; and that the plaintiff became and was thereby severely shocked and bruised and injured and in consequence thereof his nervous system was seriously affected and his heart became weak and irregular and he lost greatly in weight and his general health became much impaired; and by reason of said injuries thus sustained as aforesaid the plaintiff has expended large sums of money in endeavoring to be cured of the said pains and injuries to his nervous system, and has continued to be shocked, hurt and seriously impaired, all to the damage, etc.

(Illinois)

For that whereas, on, to wit, the, in the city of, county and state aforesaid, the defendant was possessed of certain premises known as, in said city of, and that said premises consisted of a story building; that in the rear of said building was then and there a certain freight elevator used by the said defendant in the transportation of passengers and freight from the basement of said building and up to the top floor of said building; that on the said day of the said defendant was then and there possessed of, and used and operated the said elevator in the transportation of freight and passengers from the basement of said building to and from the various floors of said building; that said elevator then and there ran through a certain shaft in said building and that from the ground floor of said building said elevator then and there ran a distance of, to wit, said ground floor and into the basement of said building; that on the said day of a certain portion of the said premises of the said defendant had been leased by the said defendant to, and was then and there used by the said in the carrying on of their business as printers and publishers; and that the said defendant as lessor of said and under an agreement with said, then and there transported upon its said elevator the property and the employees of the said

Plaintiff further avers that on the day and year aforesaid he was an infant of, to wit, years of age and there a servant in the employ of said and then and there engaged on the ground floor of said building and near the elevator shaft of said building in the performance of his duties for said, and was then and there lawfully upon said premises; that the premises of the said defendant and the building of said defendant near the elevator shaft where the plaintiff was then and there working and on the ground floor of said building were on the day and year aforesaid dimly and insufficiently lighted; that the elevator shaft through which said elevator of the said defendant then and there ran was left without any door or protection of any kind, but was at and near where the plaintiff was then and there situated left entirely unguarded and unprotected so that any person working or being near said elevator shaft when the said elevator was removed from said ground floor was liable and apt to fall into said elevator shaft and into said basement below; that it was then and there practicable and it was then and there necessary for the safety of the plaintiff and other persons that might be on the ground floor of said building and near the said elevator shaft that said elevator shaft should be guarded and protected with doors or protections so as to guard the plaintiff and other persons from unavoidably stepping or falling into said elevator shaft from the ground floor of said building.

Yet, the said defendant not regarding its duty in that behalf then and there carelessly and negligently failed and neglected to protect the said elevator shaft on the ground floor of said building with a gate or door or any covering of any kind, and then and there carelessly and negligently left said elevator shaft and the passage leading into such elevator shaft unguarded and unprotected.

And the plaintiff further avers that on, to wit, the day of, while said plaintiff was then and there in the performance of his duties for near the elevator shaft of the said defendant on the ground floor of said building and while then and there and at all times in the exercise of all ordinary care for his own safety, by reason of the carelessness and negligence of the said defendant in leaving the opening of said elevator shaft unprotected and unguarded, said plaintiff unavoidably stepped into the unguarded and unprotected opening of said elevator shaft and then and there fell down said shaft a great distance, to wit, the distance of feet, and was then and thereby greatly cut, bruised and wounded and thereby lost the sight of one of his eyes and thereby plaintiff's liver, kidneys and nervous system and brain

were permanently injured and he was otherwise permanently injured and crippled. To the damage, etc.¹⁶⁶

b

For that whereas before and, on, to wit, the day of, 19.., said defendants were engaged in the city of, county and state aforesaid, in the general warehouse business with a certain one of its storehouses used in the prosecution of its said business located at, to wit, street numbers from to street in said city; and plaintiff says it was the duty of said defendants to use reasonable and ordinary care in the construction of said premises and all parts thereof, including elevators and elevator shafts therein, to make the same safe for persons who might from time to time rightfully and with due care and caution for their own safety, enter and do work in and about said premises; and it was also the duty of said defendants to use reasonable and ordinary care to keep said premises and the parts thereof as aforesaid in a reasonably safe condition of repair and to surround the elevator shaft with a rail or guard of some kind to prevent persons rightfully and with due care and caution for their own safety as aforesaid in said premises, from walking into and falling down the same; and it was also the duty of said defendants to use reasonable and ordinary care in the lighting of said premises to make the same reasonably safe; and plaintiff says that, on, to wit, the date aforesaid, he was in the employ of C, and was ordered by said C to go to said warehouse of said defendants, where said C had certain printing presses and other machinery stored, for the purpose of bringing certain of said presses to its, the said C's new building; and plaintiff says that in pursuance of said order, he went to said warehouse of said defendants, and was rightfully in and walking about on, to wit, the floor of the same, using due care and caution for his own safety; but he says that said defendants, not regarding their duty toward him as aforesaid, carelessly and negligently constructed a certain elevator in said building, which passed up and down through the various floors thereof without enclosing by means of rail or otherwise the opening in, to wit, the floor, upon which he, the said plaintiff, was walking rightfully and with due care and caution for his own safety as aforesaid, and by reason of the failure of said defendant to properly guard the opening in said floor by means of a railing or otherwise, and by reason of the further failure of said defendant to properly light said premises, he, the said plaintiff, while so in and about said prem-

¹⁶⁶ Shoninger Co. v. Mann, 219 Ill. 242 (1906).

ises as aforesaid, stepped into and fell from, to wit, the or floor of said premises through the opening in said floor to the basement below, and was thereby greatly hurt, bruised and wounded, divers bones of his body, to wit, one femur and its neck, were fractured and he was otherwise injured both internally and externally, and became sick, sore, lame and disordered, and so remained for a long space of time, to wit, from thence hitherto, during all of which time, he, the plaintiff, suffered great pain both in body and in mind, and still continues to suffer such pain; and by reason of the injuries occasioned as aforesaid he was prevented and hindered from attending to his business, employment, occupation and affairs, and was thereby deprived of divers wages, salaries, incomes, profits and gains, which he might and otherwise would have earned, acquired and received; and by reason of the premises also he was compelled to and did pay out divers sums of money in and about endeavoring to be cured of his said wounds, bruises, hurts and fractures, occasioned as aforesaid. Wherefore, etc.

1541 Excavation or pit unguarded, Narr. (Va.)

For this, to wit, that heretofore, to wit, on the day of the defendants were and had been for some time prior to that date, the owners and occupiers of a certain lot of land in the county of, situated on the side of street between and streets, and had on and before the said date dug and excavated a deep hole and pit on said property, running along with and immediately adjoining said street, to wit, about feet deep and about feet long, and that water to the depth of about feet stood therein; and that thereupon it became and was the duty of the said defendant to use due care and caution to provide for the safety of persons passing along said street, and to fence or otherwise properly guard the said property so that persons so passing along said street would not fall into the said hole, pit, or excavation.

Yet, the said defendants, disregarding their duty in this respect, and wholly failing therein, on the day and year aforesaid, did not use due care and caution to provide for the safety of persons passing along said street, as aforesaid, but, on the contrary, negligently, recklessly and carelessly failed to fence in or otherwise properly guard the property aforesaid, wherein was a hole, pit, excavation aforesaid, of all which said defendants on the day and year aforesaid had knowledge; whereby the plaintiff's intestate without any fault or negligence on his part, and while passing along said street, as he had a perfect right to do, on the day and year aforesaid, in consequence of the failure of the

said defendants to fence in or otherwise properly guard the said property, fell and was thrown into the hole, pit and excavation aforesaid, and into the water aforesaid, and was then and there instantly drowned; wherefore, the said plaintiff by virtue of the statute in such cases made and provided, brings this suit and claims damages in the sum of dollars.

1542 Exhibition of horses, improper management, Narr. (Ill.)

For that whereas, the said defendant company heretofore, to wit, on the day of, 19.., owned and was possessed of a certain building in the city of, county of and state of Illinois, that a part of said building consisted of a large amphitheater; that said amphitheater consisted of a large open space or arena in the center, surrounded by a series of stationary seats; that at the time and place aforesaid the said defendants offered for sale and sold horses at public auction in said building; that the horses so offered for sale by said defendants were led into the said arena and there exhibited under the direct and immediate supervision and control of said defendants; that in conducting said sales said defendants invited all persons wishing to bid upon the horses so offered for sale as aforesaid to enter said building and the said arena and inspect the horses so offered for sale.

And the plaintiff avers that, on, to wit, the day and year aforesaid, at the place aforesaid, the said plaintiff was by said defendants, and each of them, then and there invited to enter said building and arena and inspect certain horses which were then and there being exhibited by said defendants for sale; that said plaintiff, in compliance with such invitation of said defendants, did then and there enter said building and arena and said defendants then and there exhibited and offered for sale to said plaintiff and to all other persons wishing to inspect or purchase said horses, a certain horse.

And the plaintiff further avers, that said defendants, while exhibiting said horse for inspection and sale as aforesaid, carelessly, negligently, improperly and wilfully whipped said horse; that by reason of such whipping of the said horse at the time said horse was so exhibited by said defendants and was so being inspected and examined by said plaintiff, said horse was caused to suffer great pain and was thus rendered highly nervous, excitable and dangerous; that as said plaintiff was so inspecting and examining said horse as aforesaid, the said defendants carelessly, negligently, improperly, wilfully and suddenly and without any warning to said plaintiff, struck said horse a violent blow with a whip; that by means of said careless, negligent, improper and wilful conduct of said defendants, and of each of them, and while the said plaintiff was

in the exercise of all due care, caution and diligence for his own safety, the said horse became fractious and ran upon and against the plaintiff with great force and violence and said plaintiff thereby then and there received injuries about the left side of his body, left arm and about his head and about his back, spine and kidneys, and other parts of his body, internally, externally, permanently and otherwise, and became sick, sore, lame and disabled, and so remained from thence hitherto, during all of which time he suffered great pain, and was hindered and prevented from attending to his affairs and business, and more particularly from following his occupation as a teaming contractor and horse dealer, at which he was capable of making and did make large sums of money, to wit, (\$.....) dollars per month; and plaintiff was compelled to and did lay out divers large sums of money, to wit, (\$.....) dollars, in and about endeavoring to be cured of his said injuries occasioned as aforesaid. To the damage, etc.

1543 Explosion and panic in street car, Narr. (Ill.)

For that whereas, on, to wit, the day of, 19.., and prior thereto, the said defendants, C D and C T, were corporations duly organized and existing under and by virtue of the laws of the state of Illinois, and were engaged in the business of transporting passengers in street cars for hire in the city of, in the county of aforesaid, and were possessed of divers cars which were propelled by electricity, and were commonly known as electric street cars, and were also possessed of certain rails or tracks which were laid upon and along a certain public highway in the said city of, to wit, upon D avenue; and the plaintiff further avers that she then and there, on, to wit, the said day of, 19.., and in the county aforesaid, became a passenger for hire upon one of defendants' said electric cars, and then and there paid her fare as such passenger; that it then and there became and was the duty of the said defendants to safely transport the plaintiff as such passenger in their said car and over their said tracks along said D avenue from its intersection with a certain public highway in said city, to wit, E avenue, to the intersection of said D avenue with another public highway in said city, to wit, C street; yet the plaintiff avers that the said defendant corporations wholly failed in their duty in that behalf, and by their servants then and there, on said D avenue, at or near to the intersection of S avenue, operated, controlled and managed said car upon which the plaintiff was a passenger as aforesaid, so negligently and carelessly, and with such a want of due care for the personal safety of the plaintiff, that by reason of such negligence and want of care by the defendants, a sudden and violent explosion

occurred in or about the machinery or appliances situated at the front end of the car, by means of which the driver of the car, commonly known as the motorman, was accustomed to control the motions of the car, which explosion was accompanied by a dazzling flash of fire which caused the passengers on said car to believe that the same was on fire, and as an immediate and natural consequence of said explosion, and of said flash of fire, a panic took place among the passengers on said car, and a stampede for the door set in, in the course of which the plaintiff, while exercising due care and diligence for her own safety, was hurled violently to and upon the floor of said car, and while upon the floor of said car was trampled upon by other passengers in said car, they being then in a state of panic caused by said negligence of defendants, as aforesaid, whereby and by reason whereof the plaintiff sustained great and severe injuries, and was greatly wounded, hurt and bruised, and suffered a violent shock to her nervous system, and severely strained, bruised and injured her right knee, and broke the knee cap of said knee, and became otherwise sick, sore and disordered, and remained so for a long time, to wit, from thence hitherto; and by reason of the injuries aforesaid said plaintiff suffered great pain and anguish, and was hindered and prevented from attending to her ordinary business and affairs, and was deprived of various profits and gains which she otherwise could and would have had, and will be hereafter hindered and delayed from following her business and affairs as she otherwise could and would have done. And the plaintiff further avers that when she was so thrown upon the floor of said car, as aforesaid, certain eye-glasses, or spectacles, which she wore, and which she was obliged to wear, in order to attend to her said business affairs, were broken and destroyed, which eye-glasses, or spectacles, were reasonably worth the sum of, to wit, dollars. Wherefore, etc.

1544 Explosion, carbonic acid gas, Narr. (Mich.)

For that whereas the said defendant, at the time of the committing of the grievances hereinafter alleged, was a corporation organized and existing under the laws of the state of Michigan, and engaged in the retail drug and soda water, etc., business in the city of That among other places, defendant conducted at said time and for a considerable period prior thereto, a drug store at, to wit, No. avenue, in said city, and in the conduct of said store, operated and maintained a fountain from which it dispensed among other liquids, soda and vichy waters. That in the maintenance and operation of said fountain and for the purposes of supplying the same with such waters, it used metal tanks which, at the time of the committing of the

grievances hereinafter alleged and for a long time prior thereto, it was the practice of said defendant to fill, in the basement underneath the first floor of said premises, with the waters required for said fountain and with carbonic acid gas under a high pressure. That at the time of the committing of said grievances, said defendant possessed, used and maintained in the basement of said premises, an apparatus consisting of, to wit, a pressure gauge with two hose attachments, one of which, when in use, connects with the drum from which carbonic acid gas is taken and the other with the metal tank to be filled as aforesaid. That the gas contained in the drum is released by means of the turning of a key which opens a valve and the gas then passes from the drum through the tube connecting with the gauge and thence through the tube connected with the tank to be filled, which gauge, when in proper order, registers the pressure in the tank while the same is being filled with gas.

That at said last mentioned time, there was connected with said apparatus an automatic shut-off or device which, if in good order, could be set at any required pressure, and if so set, would, when the required pressure was reached, automatically shut off the flow of gas and thereby prevent an excess quantity of gas from being forced into the metal tanks, and rendered, when in perfect condition, the filling of tanks with carbonic acid gas, at the time of the committing of the grievances aforesaid, reasonably safe, especially if the tank to be filled was not defective and capable of standing the pressure to which the gauge was set.

That at the time aforesaid, in the filling of said tanks, it was and had been for a long time prior thereto, the practice of said defendant, while the gas was being put in such tank, to require of its employees engaged therein, to rock or shake the same in order that the water in such tank might more readily absorb the gas and permit of greater quantities of said gas to be put therein. That at the time of the committing of said grievances, said tanks, when in proper condition and not defective, would permit with safety the placing therein of a pressure of, to wit, five hundred pounds of gas. That the filling of such tanks was attended with the danger of explosion if too large a quantity of gas was forced therein or if the said tank was defective, there was danger of such tank exploding, even if the gas pressure in tank was considerably less than five hundred pounds; and plaintiff further avers that at the time of the committing of the grievances aforesaid, there were no means of determining the gas pressure in such tanks, except as the same was indicated by the gauge aforesaid, and that if the apparatus or gauge aforesaid was defective, or out of order or failed to properly register the pressure, or the automatic shut off was defective or out of order, or was not properly set or regulated, there was great danger of overloading the

tank to be filled with carbonic acid gas and cause it to explode, particularly a tank which was defective, worn or in a weakened condition; all of which facts were then and there well known to the defendant. And plaintiff avers that by reason of the premises, well knowing such danger, it then and there became the duty of said defendant to provide and use only safe and sound tanks, in no wise weak or defective and to provide its employees with a safe place to work in while filling the same, and to keep, use and maintain in its establishment aforesaid, for the proper protection of its employees who might or should be engaged in filling tanks in said basement with carbonic acid gas, a safe and proper apparatus, gauge and automatic shut-off and have and keep the same respectively in good running order and not to permit the same to get out of order or to become defective, and to have and keep the same in charge of a competent person to operate, regulate and control the same while such apparatus and gauge was being used in connection with the filling of such tanks as aforesaid, particularly while the tank was being rocked or shaken; and to see to it that the automatic shut-off was in good order and properly set, and to then and there fully acquaint its employees who were or might be engaged in or assisting in filling said tanks, of the dangers attendant thereat as aforesaid and to fully apprise them of the use of said gas and apparatus and the dangers connected therewith and of the operating of said apparatus and the gauge and automatic shut-off which regulated the gas pressure, and if defective, of such condition, particularly while such tanks were being filled with gas.

That said defendant wholly neglected its duty in the several matters aforesaid; and failed and neglected then and there at the time of the committing of the grievance aforesaid, to furnish sound and safe tanks to be filled; and did not then and there or at any other time, apprise plaintiff's intestate of the dangers attendant to the filling of such tanks with carbonic acid gas as aforesaid, or in the rocking or shaking of the same while it was being filled with gas; and did not then and there or at any other time, inform him of the proper and safe method of operating the apparatus and gauge and shut-off used in regulating and registering the pressure of gas so put in the tanks as aforesaid, or that such apparatus or shut-off was out of order or defective; and did not then and there furnish a safe and perfect apparatus or automatic shut-off as aforesaid or see to it that at the time of the committing of the grievances aforesaid the same if in perfect condition was properly set; and did not then and there or at any other time acquaint said plaintiff's intestate with the danger that might or could arise from overloading the tanks which were to be filled with such gas, particularly the tank which exploded and caused the death of plaintiff's intestate as hereinafter set forth; and did not then and there or at any other time, apprise plain-

tiff's intestate of the defective condition of the tank aforesaid or furnish him with a safe place to work in while assisting in filling said tank; and did not furnish him with safe appliances to work with; and did not then and there properly safeguard said plaintiff's intestate against the explosion of said tank.

And plaintiff further avers that her said intestate, while employed as a porter or helper in said defendant's drug store or establishment aforesaid, he having entered such employ shortly before the committing of the grievances hereinafter alleged, to wit, the day of, 19.., he being then and there wholly ignorant of the danger attendant the filling of said tanks as aforesaid, and being wholly unfamiliar with the apparatus, gauge or automatic shut-off hereinbefore mentioned, and being ignorant of the defective condition thereof respectively, on, to wit, the day of, 19.., while assisting, by defendant's direction, an employee of said defendant (who had been placed by said defendant in charge of that branch of work in its said store), in filling a tank in the basement of said defendant's premises at avenue, aforesaid, with carbonic acid gas, and in rocking or shaking the same, and while said tank was in a defective condition and under a pressure of less than, to wit, two hundred pounds, and while said apparatus and gauge and automatic shut-off aforesaid were out of order and in a defective condition, and while said apparatus was not being operated, regulated or controlled in a proper manner, and while the same was not in charge of or being operated by a competent person, and while said negligence and omissions on the part of said defendant were then and there unknown to said plaintiff's intestate as aforesaid, and were well known to the defendant, or if not known could or would, by the exercise of reasonable care on its part have known thereof, and of plaintiff's intestate's ignorance in the premises, and while plaintiff's intestate was exercising due care, and without fault or negligence on his part, said tank exploded with great force and violence, then and there killing plaintiff's intestate and mutilating and disfiguring his head, limbs and body.

And plaintiff avers that the death of her said intestate was caused by the wrongful neglect and default of the defendant as aforesaid, and that if death had not ensued, plaintiff's intestate would have been entitled to maintain an action against and recover damages from the defendant in respect thereof; and plaintiff further avers that on, to wit, the day of, 19.., she was duly appointed by the probate court for the county of, state of Michigan, the administratrix of the estate of, deceased, and afterwards duly qualified as such. And plaintiff brings here into court her letters testamentary, whereby it fully appears that she has been empowered to administer the estate of said deceased; and

plaintiff further avers that the following are the persons entitled by law to the general property of said deceased under the statute of Michigan governing the disposition of the personal property of intestates, viz.: the plaintiff, who is the widow of said deceased, and, aged years,, aged years, respectively, or thereabouts, children of said deceased; and plaintiff further avers that the said widow and children were dependent upon said deceased for their support and maintenance; that he was accustomed to earn large wages, to wit, \$. per month, in his usual vocation, out of which he supported and maintained your petitioner and children. That by his death they have been deprived of the means of support and suffer pecuniary injury, and plaintiff says that by virtue of the statute made in such case and provided, the defendant has become liable to pay to this plaintiff as such administratrix, \$.; and therefore she brings suit.

1545 Fairs and carnivals, action

A municipality is liable for an injury resulting from unsafe structures put up for exhibitors at carnivals and street fairs held under its authority in streets or public places, for the reason that a municipality has no power to grant permission for such purposes and that such occupancy of the streets is a public nuisance *per se*.¹⁶⁷ A city which invites its patrons to seats upon platforms to witness games, sports and races is liable for injuries sustained by a failure to exercise due care in the erection and maintenance of these places.¹⁶⁸

1546 Fairs and carnivals, Narr. (Ill.)

For that whereas the said defendant,, was, on or about the day of, 19.., a municipal corporation, organized and existing under the laws of the state of Illinois, and on the day and date aforesaid was in charge of and controlled and managed certain streets situated in the said city, county and state aforesaid, and among other streets said city was possessed of, managed and controlled two certain intersecting streets known as street and avenue, in, county, Illinois.

Plaintiff avers that it then and there became and was the duty of the said defendant to so manage and control its said streets as not to injure the plaintiff; yet, the said defendant

¹⁶⁷ Van Cleef v. Chicago, 240 Ill. 318, 324, 328 (1909).

¹⁶⁸ Logan v. Agricultural Society, 156 Mich. 537, 541 (1909).

well knowing its duty in this behalf did knowingly authorize and permit a certain building to be erected upon and in a street of said city, at the place aforesaid, to wit, at and in the intersection of street and
 avenue, which said building was erected in an unsafe and dangerous manner, particularly in that a certain stairway in and about the said building was unguarded by guard rails.

2. And the plaintiff avers that it also then and there became and was the duty of the said defendant to so control and manage its said streets and to so take charge of them, as not to inflict an injury upon persons rightfully upon said streets; yet, the said city, well knowing its duty in this behalf, on the day and date aforesaid, allowed, authorized and permitted a certain building to be erected at or near the intersection of the two streets aforesaid, and within the intersection of the streets aforesaid, and upon and in one or the other of said streets, which said permission was granted by the city council of said city of at the regular meeting of said city council, held,, 19.., and which permission was in words and figures as follows, to wit: (Insert copy of order of permission.)

Plaintiff further avers that acting upon the said permission, and in pursuance thereof, a certain building was erected upon and in said streets of said city, as aforesaid, which said building was for the purpose of giving entertainments and performances, and was in direct violation of a certain ordinance of the city of, which was known as section of the city ordinances of the city of, and which said ordinance was in full force and effect at the time, and which said ordinance was in the words and figures following, to wit: (Insert copy of ordinance).

3. And the plaintiff avers that it also became and was the duty of the said defendant to so keep, manage and control its streets as not to injure persons rightfully thereupon; yet, the said defendant, city of, on or about the date aforesaid, knowingly permitted and allowed and authorized a certain building to be erected and to remain for a considerable space of time upon or in the intersection of street and avenue, two intersecting streets in the city of, county and state aforesaid; and which said building was situated upon and in the streets of the said city, and which had remained upon and in said streets for a considerable space of time, whereby said building became and was a nuisance, and concerning which the city knew or should have known, and which said building was in an unsafe and unstable condition in this, to wit, that the said stairs leading to and from said building were unprotected and without a guard rail, and concerning which the defendant knew or should have known.

By reason of the several breaches of duty aforesaid, said plaintiff, while coming out of said building, together with a large number of other persons, and while in the exercise of all due care and caution for her own safety, was pushed and crowded off of and from said stairway, and by reason thereof fell to and upon the ground and was greatly hurt, bruised, wounded and injured, particularly in and about her right leg, which was broken and sprained; and by reason thereof plaintiff became and was sick, sore, lame and disabled, and has been unable to do any work and will always remain unable to do any work, and will always continue to be sick, sore, lame and disabled, and has laid out and expended divers large sums of money in and about endeavoring to be cured of her injuries, to wit, the sum of(\$.....) dollars. Wherefore, etc.

1547 Fenders defective, Narr. (Ill.)

For that whereas heretofore, on, to wit, the day of, 19.., the defendant was possessed of and operating a certain street railway extending longitudinally upon and along street, then and there a public highway in the city of, in the county and state aforesaid, and upon which said railway the defendant then and there operated certain trains of street cars; that at the time and place aforesaid plaintiff was a minor of tender years, to wit, years of age, and was then and there traveling westward across defendant's said railway tracks upon said public highway, to wit, between street and court in said city, and while so traveling and while he was exercising such care as could reasonably be expected of one of his years and experience, the defendant, through certain of its servants in that behalf, was then and there operating a certain train of street cars southward upon and along said railway. That there was long prior to and then and there a certain section of a certain city ordinance of the city of, in full force and effect, which provided as follows: (Insert fenders' ordinance). That the southerly or front car of said train was a grip car and that the defendant did, in obedience to said ordinance, long prior to and then and there provide and maintain a fender on the forward or southerly end of said grip car of steel and of the basket kind, attached to the front end of said grip car as and for the purpose aforesaid; but then and there negligently permitted said fender to become and remain in such a defective and improper condition of repair that it would not serve the purpose for which it was so required, provided and used, in this, that said fender was so high above the track and loose and dilapidated that it would permit a child or other person to pass under said fender in the event of his being overtaken

and struck by said fender while upon the track upon which said car was running.

By reason of which premises said fender then and there struck and knocked the plaintiff down, and as a direct result and in consequence of said defective and improper condition of said fender the plaintiff passed under said fender and car instead of falling upon top of said fender and being sustained by said fender, as he would have done if said fender had been in proper condition; that one or more of the wheels of said car thereby then and there passed over one of plaintiff's feet, and thereby then and there so crushed and mangled his said foot that it became necessary to amputate his said foot and part of his leg, and same were so amputated a short time afterwards; that divers other bones, ligaments, muscles, tendons, and membranes of the plaintiff's body were also thereby then and there sprained, dislocated, broken and otherwise injured; that he was disfigured, cut, bruised and wounded about his head, face, limbs and body and sustained serious injuries to divers of his internal organs and a serious shock and injury to his spine and nervous system; and that as a direct result and in consequence thereof he has ever since suffered and will continue permanently to suffer great pain, and has become and is permanently crippled, sick, sore, disordered, and incapacitated from attending to or transacting any ordinary business or affairs, as a result of which he will be deprived of great gains and profits which he might and otherwise would have made and acquired. To the damage, etc.

1548 Fenders or headlights, Narr. (Mich.)

For that whereas the defendant, at the time of the committing of the grievances hereinafter set forth, and for a long time prior thereto, was a corporation organized under the laws of the state of Michigan, and engaged as a common carrier of passengers; that as such carrier it operated an electric railroad running from the city of, to the city of, in the state of Michigan, and elsewhere; that it operated and ran its cars propelled by electricity on and over tracks laid along and upon certain public avenues, streets and alleys, in the city of; that the usual course of operation of the said cars within the city of by said defendant was to run them into the city of in a northerly direction, over and along the east track on street; thence over the east track upon a bridge spanning river, which bridge is commonly called street bridge; then along the east track on avenue to street, then upon the track on street, which is the northern terminus of said railroad; then the said defendant would back its cars out from the street track to the west track on

..... avenue so that the car would face the south; then it would run its cars in a southerly direction along the west track on avenue as aforesaid; then over street bridge on the west track; then along the west track on street; that a short time prior to the grievance mentioned it had been found necessary to discontinue the running and operating of said cars over street bridge; and that it then and there became necessary for the said defendant to adopt another plan for the operating and running of its cars within the said city of

And it then and there became and was the duty of the said defendant in operating its said railroad and running its said cars over and other streets in the said city of....., to adopt a plan of operating and running said cars which would be considered good railroading under all the circumstances, and to adopt a plan which would reasonably protect plaintiff's intestate and other persons lawfully using street aforesaid, so that the safety of their persons while so engaged would not be jeopardized by the presence of defendant's cars upon said street.

Yet, the said defendant, well knowing the premises and well knowing that street is one of the principal streets of the city of, a city of upwards of thousand inhabitants, and as such traveled by a large number of persons, disregarding its said duty did not adopt a plan of operating and running said cars which would be good railroading under all the circumstances, and did not adopt a plan of operation which would reasonably protect plaintiff's intestate and other persons lawfully using said street. But on the contrary, the said defendant negligently and carelessly adopted a plan of operating and running its said cars which was highly dangerous to plaintiff's intestate and other persons lawfully traveling upon said street, and negligently and carelessly directed and permitted its employees to run its said cars northward bound from the east track on street onto the track on street bound westward, thence to the track on place bound southward, thence to the track on street bound eastward, thence to the west track on street headed southward, then to back its said cars, without fenders or headlights on the rear or any other distinctive warning or signal which would convey the idea to persons unaccustomed to railroading that said car was about to run backward along the west track of said street, a track heretofore invariably used for cars running in a southerly direction, in a northerly direction to its waiting room located on the west side of street, a long distance from street, to wit, feet, all of which distance from street to street being in the busiest business section of said city of

2. And it then and there became and was the duty of defendant, when backing its said cars on street as aforesaid, to operate said cars at a slow rate of speed and to have them under perfect control to avoid injuring anyone then using the street; and especially it was the duty of the defendant, while backing its said cars over the intersection of and streets, which intersection is just north of the point where the said cars started to back, and which intersection is designed especially for the crossing of the streets by pedestrians and others and is located in the business district of said city of and traveled by many persons, to run said cars at a slow rate of speed and to have said cars under perfect control and to have a man on the rear of said cars to keep a constant lookout to avoid injuring the plaintiff's intestate and others then lawfully using the street or crossing.

Yet, the said defendant, well knowing the premises and well knowing that its said cars, being headed in a southerly direction and being upon the west track, a track up to a short time prior to the grievance hereinafter mentioned invariably used for the south bound cars, and having no fenders or headlight on the rear of said cars, would give the plaintiff's intestate and others lawfully using said street the impression that said car was bound southward, disregarding its said duty did not operate and run its said car under perfect control and did not have a man on the rear of said car to keep a constant lookout to avoid injuring those persons then and there using said street or crossing. But on the contrary, the said defendant negligently and carelessly, in the evening of said day and after darkness had fallen, mismanaged one of its said cars at the point aforesaid, and then and there suddenly backed its said car on the west track on street across the intersection of said and streets, without having its said car under perfect control and without having a man on the rear of said car to keep a constant lookout to avoid injuring those persons then and there lawfully traveling on said street or crossing.

3. And it then and there became and was the duty of the defendant before backing its car on street in the night time to give notice to those persons then and there on the street or crossing, of its intention so to do, by proper signals of warning, and by proper lights on the rear of said car, and while backing its said car on said street to give notice of the approach of said car to those persons then and there using said street or crossing by the ringing of a gong or other proper signal or signals, and by having such light or lights on the rear of said car as would indicate to the plaintiff's intestate and others then and there using said street or crossing that said car was northward bound, and to have said car under control

and to have a man on the rear platform of said car to keep a constant lookout to avoid injuring the plaintiff's intestate and others then and there using said street or crossing.

Yet, the said defendant, well knowing the premises and well knowing that its said car, being headed in a southerly direction and being upon the west track, a track up to a short time prior to the grievance hereinafter mentioned invariably used for the south bound cars, and having no fenders or headlights on the rear of said car, would give the plaintiff's intestate and others lawfully using said street the impression that said car was bound southward, disregarding its said duty did not before backing its said car on street in the night time on the date aforesaid, give notice to the plaintiff's intestate and others then and there on said street or crossing of its intention so to back its said car by giving proper signals of warning and by having proper lights on the rear of said car and did not, while backing its said car on said street, give notice of the approach of said car to the plaintiff's intestate and others then using said street, by the ringing of a gong or other proper signal, and by having such light or lights in the rear of said car as would indicate to them that said car was northward bound, and did not have said car under perfect control, and did not have a man on the rear platform of said car to keep a constant lookout to avoid injuring the plaintiff's intestate and others then and there using said street or crossing. But on the contrary thereof, on the said day and after darkness had fallen, suddenly started to back its said car on street without giving notice to plaintiff's intestate and those persons then and there using the street or crossing of its intention so to do by proper signals of warning and by proper lights on the rear of said car, and then and there negligently and carelessly mismanaged one of said cars at the point aforesaid, and then and there backed its said car on the west track on street across the intersection of said and streets, without giving notice of the approach of said car, by the ringing of a gong or other proper signal, and without having such light or lights on the rear of its said car as would indicate to the plaintiff's intestate and others then and there using said street or crossing that said car was northward bound, and without having its said car under perfect control, and without having a man on the rear of said car to keep a constant lookout to avoid injuring the plaintiff's intestate and others then and there using said street or crossing.

And by reason of the negligent plan of operation of said cars adopted by defendant as aforesaid, on, to wit, the day of, 19.., in the evening of said day and after darkness had fallen, at the point where said street intersects with said street, while plaintiff's intestate was crossing street in a northerly direction, and while said intestate was in the lawful use of said

street and crossing, and in the exercise of due care and caution, and without fault or negligence on the part of him, the said intestate, one of the cars of the said defendant, which had just rounded the curve from street onto the west track on street, and which car gave every appearance of being southward bound, and which car then and there had no one on the rear end thereof to keep a constant lookout to avoid injuring those who were in the lawful use of said street, suddenly backed without giving any warning whatever and without having such light or lights on the rear of said car as would indicate to those persons who were then and there on the street that said car was northward bound, and struck intestate of plaintiff, while he was crossing street as aforesaid, knocking him down and running over him; whereby he, the plaintiff's intestate, was then and there crushed and killed.

And plaintiff avers that the death of her said intestate was caused by the negligence and careless mismanagement of the said car and the failure of the defendant to adopt a proper plan of operating and running its said cars upon the tracks along street aforesaid; and that if death had not ensued the plaintiff's intestate would have been entitled to maintain an action against and recover damages from defendant on account thereof.

And plaintiff avers that on, to wit,, 19.., she was duly appointed by the probate court for the county of, state of Michigan, administratrix of the estate of said, deceased, and afterwards duly qualified as such, and the plaintiff brings here into court her letters testamentary dated the day of, 19.., whereby it fully appears that she has been empowered to administer the estate of said deceased.

And plaintiff further avers that the following are persons entitled by law to the personal property of said deceased, under the statute of Michigan governing the distribution of personal property of plaintiff's intestate, viz:, who is the widow of said deceased.

And plaintiff further avers that the said widow was wholly dependent upon said deceased for her support and maintenance; that he was accustomed to earn large wages, to wit, dollars per month in his usual avocation as a, out of which he supported and maintained said widow; that by his death she has been deprived of the means of support and suffered pecuniary injury, and plaintiff says that by virtue of the statute in such case made and provided, being section (10,427) of the Compiled Laws of 1897, the defendant has become liable to pay to the plaintiff the pecuniary damage suffered as aforesaid. All to the damage, etc.

1549 Fencing right of way, action

A city or village has power to require railroad companies to fence their right of way within the limits of the municipality, and a railroad company may become liable for a personal injury which has been caused by a violation of an ordinance that requires the fencing of the right of way within the municipality.¹⁶⁹ A child of tender years who enters upon the unfenced right of way of a railroad company and is injured cannot base his action for the injury on the Illinois statute relating to fencing and operating of railroads.¹⁷⁰ But in Michigan the action is maintainable under a similar but broader statute.¹⁷¹

1550 Fire communicated by locomotive engine, Narr. (Ill.)

For that whereas the decedent on and before, to wit, the day of, 19.., and during the lifetime of said decedent was the owner of and together with her husband and their children was occupying and residing upon a certain close situated in said county of and on which said close was located a certain dwelling house with the appurtenances thereto belonging; and the defendant was then possessed of, using and operating a certain railroad, extending from city in the state of Illinois to and across said county of to the city of, and was also possessed of, using and controlling a certain right of way to the said railroad there appertaining, extending along and adjoining said close of the decedent and which said right of way consisted of a strip of land of the width of, to wit, a feet extending a distance of, to wit, feet on each side of the central line of said railroad.

And although it was before that time and then the duty of the defendant to keep the said right of way free from all dead grass, dry weeds and other dangerous combustible materials so that fire from the locomotive engines and trains of the defendant on said railroad would not by means of such dead grass, dry weeds and other dangerous and combustible materials spread and be communicated therefrom to the said residence, property and close of the said decedent; yet the defendant not regarding its duty or using due care in that behalf did not nor would keep said right of way free from dead grass, dry weeds and other dangerous combustible materials as aforesaid, but on the contrary thereof before that time negligently suffered large quantities of such dead grass, dry weeds and

¹⁶⁹ *Heiting v. Chicago, Rock Island & Pacific Ry. Co.*, 252 Ill. 471; Par. 27, sec. 1, art. 5, Cities and Villages act.

¹⁷⁰ *Bischof v. Illinois Southern Ry. Co.*, 232 Ill. 446 (1908).

¹⁷¹ *Keyser v. Chicago & Grand Trunk Ry. Co.*, 66 Mich. 390 (1887).

other dangerous combustible materials to accumulate and then negligently suffered the same to remain upon said right of way.

2. And although it was also before that time and then the duty of the defendant to provide its locomotive engines used and operated upon and along said railroad with the proper and most approved machinery and appliances to prevent the escape of fire from said locomotive engines and to keep in constant use and proper repair such machinery and appliances; and although it was also before that time and then the duty of the defendant to so operate, run and manage said locomotive engines upon and along said railroad as to prevent the escape of fire from said locomotive engines to the injury of property along and near said railroad; yet, the defendant not regarding its duty or using due care in that behalf, did not nor would keep its said locomotive engines on said railroad equipped with the proper and most approved machinery and appliances to prevent the escape of fire from said locomotive engines, and did not nor would so operate, run and manage the same on said railroad as to prevent the escape of fire from said locomotive engines to the injury of property along and near said railroad. And while a certain locomotive engine of the defendant and under its management and control was then and there passing upon the said railroad, along the said close, divers sparks and brands of fire then and there escaped and were thrown from the same locomotive engine by and through the mere neglect and failure of the defendant to provide said locomotive engine with the proper and most approved machinery and appliances to prevent the escape of fire from said locomotive engine and by and through the mere neglect and failure of the defendant to so operate, run and manage said locomotive engine on said railroad there as to prevent the escape of fire from said locomotive engine, and set fire to certain combustible materials then on said close and right of way, and which said fire set as aforesaid, spread to upon and over said close of decedent.

By means whereof fire then and there emitted and thrown from a certain locomotive engine and train of defendant on said railroad to and upon said right of way and dry grass and weeds and other dangerous combustible materials there, then and there ignited and set on fire said dry grass and weeds and other dangerous combustible materials and thence spread and was communicated to and spread upon said close of decedent. And while the decedent was then and there with all due care and caution for her own personal safety lawfully endeavoring to suppress and extinguish said fire on said close communicated as aforesaid and which said fire the plaintiff avers was traveling, progressing and extending toward and threatening the destruction of said dwelling house with the appurtenances thereto belonging on said close, the clothing of decedent was

then and there unavoidably ignited and set on fire by flames, sparks and brands of fire blown and thrown upon and communicated to the clothing of decedent from said fire on said close; and thereby, the clothing of decedent was, then and there, while she, the decedent, was in the exercise of all due care and caution for her own personal safety, burned and consumed and the decedent burned, maimed, wounded and mortally injured; and in consequence whereof said died on the day of, 19... (Add last two paragraphs of Section 1495)

1551 Footboard on engine pilot defective, Narr. (Miss.)

That the defendant, the said, is a railroad corporation duly chartered under the laws of the state of Mississippi, and operating a line of railroad traversing said state from east to west and passing through the district of county in the said state, and having an agent residing in the of in said district of county, upon whom service of process can be made.

That plaintiff was, on the day of, 19..., and for a long time prior thereto, employed in the service of the defendant as a brakeman and on said date he was actively engaged in the discharge of his duties as front brakeman on one of the defendant's trains, to wit, freight train number which was being pulled by engine number in charge of engineer, said train being in charge of conductor, which said freight train had left the, a station on defendant's road, on the morning of said day of, 19..., its destination being the city of, another station on said defendant's road, said train being a local freight train and engaged in interstate commerce.

That when said train number arrived at a station on defendant's road about miles east of said of, the conductor in charge of said train, having received orders from the train-dispatcher to clear at said station of for passenger train number of defendant, which was east bound, and then due, gave orders to the crew of said train number to put said train upon a siding.

That as front brakeman on said train, it was the duty of plaintiff to throw open the switches in entering and leaving the siding, and that in the discharge of said duty it was plaintiff's custom to throw open the first switch in order that the train might enter the siding and then to step upon the pilot of the engine and ride to the end of the siding where he would throw open the switch at the other end of the siding in order that the train could pass again to the main line; that in riding on the pilot he would stand upon the metal footboards

which are furnished for that purpose, and which, when properly constructed, are fastened on both sides of the pilot with bolt and nuts, plaintiff at the same time holding with his hands the iron hand-hold which was also provided for that purpose, that being the usual and customary way for the front brakeman to ride from front switch to the end switch while engaged in assisting in so switching his train, and being the way in general use among all railroads, and especially being the way in general use on defendant's said road by defendant's servants on said date.

That on said date plaintiff was ordered by the conductor of said train number to open the switch so that said train might be switched upon the siding in order to clear the main line for the said passenger train number, and plaintiff thereupon proceeding to obey said order in the usual and customary way, opened the first switch and was then proceeding to take his station upon the metal foot-boards on each side of the pilot, in order that he might be transported to the other end of the siding, where he would be ready to open the end switch, so that the said train could again pass upon the main line and proceed upon its journey towards the station of, and plaintiff had placed his left foot on the right foot-board of the pilot, and stepped with his right foot on the left foot-board of the pilot, holding on with his hands to the iron hand-hold, provided for such purpose, and just as he stepped with his right foot on the left metal foot-board on the pilot, and while he was discharging his duties in the usual and customary and safe way, and with all due and proper regard for his own safety and in the exercise of reasonable care on his part, the left metal foot-board tilted, gave way, and broke loose from its fastenings, which were insufficient and insecure, and caused plaintiff to lose his foot-hold, in consequence whereof he was violently thrown from the pilot, in front of the moving engine and said engine and a number of cars attached thereto ran over plaintiff's left foot and leg, horribly bruising, scratching and maiming it so that it became necessary to amputate the said left leg between the foot and the knee.

Plaintiff says that the cause of his said fall from the pilot of said engine, and the consequent injuries suffered by him, was the defective and insecure condition of the metal foot-board on the left side of the pilot of said engine, on which plaintiff had just stepped with his right foot, in the discharge of his duties as aforesaid, which said foot-board defendant had negligently allowed to get out of repair and become defective and unsafe.

Plaintiff says that it was the duty of the defendant under the law, to furnish him reasonably safe machinery and appliances with which to work, and a reasonably safe place to work; but plaintiff says that the defendant disregarded its duty in

that respect, and carelessly allowed said foot-board to become unsafe and defective, in that it was not provided with a sufficient number of bolts, and the bolts which were on the foot-board were not fastened with nuts, as they should have been, and was otherwise in a bad state of repair; and plaintiff says that said foot-board was not strong enough to hold up any weight whatever, and was wholly unsuited for the purpose for which it was intended, all of which defendant well knew, or by the exercise of reasonable care and diligence on its part it ought to have known.

Plaintiff says that the defective and unsafe condition of said foot-board was wholly unknown to him at the time he received said injuries.

Plaintiff says that he is years old, and that at the time he received the said injuries he was in robust health, and sound in body, and that he was earning as brakeman the sum of dollars per day.

Plaintiff says that on account of said injuries he has suffered great physical pain and mental anguish and has been incapacitated for life to perform manual labor, upon which he was dependent for a livelihood; that he has lost much time, and has been crippled for life and permanently disabled, and his capacity to earn a livelihood practically destroyed. Wherefore, etc.

1552 Foundation wall, collapse, Narr. (Ill.)

For that whereas, heretofore, on, to wit, the day of, 19.., at, to wit, in the county of, state aforesaid, said defendant was the owner of and had the control of certain lots in addition to the city of, county and state aforesaid; that the defendant desired to construct a business building of brick with stone foundation upon said lots and so undertook to construct and did construct or cause to be constructed under his own supervision and direction a stone foundation wall under said proposed brick business building, and in the construction of said foundation used inferior rock and mortar, which was burnt and wholly insufficient and unfit for such use.

And it then and there became and was the duty of the said defendant to have said stone foundation wall so built that the same would have been in reasonably good and safe condition upon which to erect the brick building as aforesaid. Yet, the defendant, not regarding his duty in that behalf and well knowing the bad and unsafe condition of said foundation stone wall, on, to wit, the day and year aforesaid, then and there wrongfully and negligently suffered and permitted the plaintiff to be and remain in ignorance of such bad and unsafe condition of said foundation stone wall.

2. And the plaintiff further avers that the defendant knew or

by the exercise of reasonable care could have known that said foundation constructed as the same was constructed out of said inferior materials aforesaid would not support the brick walls to be placed upon the same in the construction of the said building, and the defendant with full knowledge of the said weak and inferior stone foundation walls, without giving the plaintiff any notice or warning of their said condition induced the plaintiff and his partner, one, who were then brick-laying contractors, and the plaintiff and said did enter into a contract with him, the defendant, for the construction of said brick walls, upon said stone wall or foundation, not knowing of the poor construction and condition of the said stone foundation and not knowing that the said stone foundation was insufficient to support the brick walls which the defendant contracted with the plaintiff and said to place upon the said foundation, and without any reasonable opportunity of acquainting the said plaintiff of the condition of said stone foundation wall.

And the plaintiff while engaged in laying brick upon said stone wall in pursuance of said contract and with no notice of the inferior construction and weak condition of the said stone foundation wall, and while in the exercise of due care and caution for his own safety, by reason of the weak, rotten and inferior condition of said rock foundation wall, the same gave way, precipitating the plaintiff with great force to the ground and he was then and there hurt, bruised and wounded and he, the plaintiff, was internally injured and he then and there became and was sick, sore, lame and disordered, and so remained for a long time, to wit, from thence hitherto, during all of which time plaintiff suffered great pain and was hindered from performing his ordinary affairs and business and in consequence thereof was obliged to and did then and there spend divers sums of money amounting to the sum of, to wit, dollars in endeavoring to be cured of his aforesaid injuries occasioned as aforesaid. To the damage, etc.

1553 Frightening horses or mules, Narr. (Ill.)

For that whereas, the defendant, on the day of, 19.., was then and there driving a certain automobile, said certain automobile being then and there propelled by mechanical power, upon and along a certain highway in the state of Illinois, which said highway was not then and there within the limits of any incorporated city or village, and which said highway extended in a northerly and southerly direction on the line between the aforesaid county of and the county of in said state of Illinois; that said defendant was then and there driving the said automobile upon the said highway, in a northerly direc-

tion, at a point about miles north of the village of in said county; that on the day and date last aforesaid, the plaintiff was traveling upon the aforesaid highway, in a southerly direction, in a certain vehicle, which vehicle was then and there hauled and propelled by two certain mules, which said mules were then and there attached to said vehicle, and were being driven by

.....
And while the plaintiff, with all due care and diligence, was so traveling upon said highway, the said defendant so driving and running the aforesaid automobile, did meet and come up to, in said highway, the team of mules and vehicle, in which the plaintiff was then so traveling, and which the aforesaid with all due care and diligence, was then and there driving. Yet, the defendant, not regarding his duty or using due care, was then and there, with great negligence and contrary to the form of the statute, driving and running said automobile at a speed greatly in excess of fifteen miles an hour; by means of which negligence and disregard of the statute and by means of the great speed of such automobile as aforesaid, did then and there greatly frighten the aforesaid team of mules, so driven by the said so that the said mules, by means aforesaid, became unmanageable and escaped from the control of their said driver, and did then and there so twist and turn the said vehicle about that the plaintiff was, while using all due care and diligence for his own safety, thrown thence to the ground there, with great violence.

2. And for that while the plaintiff, with all due care and diligence, was so traveling upon said highway, the said defendant so driving the aforesaid automobile, did then and there approach and meet and pass, in said highway, the two certain mules, and the certain vehicle in which the plaintiff was then and there traveling, and which the said with all due care and diligence was then and there driving; and for that also while the said defendant was so approaching the vehicle in which the plaintiff was then and there traveling as aforesaid, it did then and there appear to the said defendant, so driving the automobile, as aforesaid, that the aforesaid mules, so driven by the said and attached to the aforesaid vehicle, were then and there about to become frightened by the approach of the aforesaid automobile, and when it then and there so appeared to the said defendant, so traveling as aforesaid, that the aforesaid mules were so about to become frightened, it then and there became and was the duty of the said defendant, as was then and there provided by law, to cause the aforesaid automobile, so driven by said defendant, to come to a full stop, until the aforesaid mules had passed said automobile; yet, the defendant, although it was then and there his duty to cause the aforesaid automo-

bile to come to a full stop, and although it then and there appeared to said defendant that said mules were about to become frightened at the approach of the aforesaid automobile, did then and there negligently, maliciously and contrary to the form of the statute in such case made and provided, fail to cause the aforesaid automobile to come to a full stop until the aforesaid mules had passed; wherefore, and by means of the aforesaid negligence of the defendant, and by means of the failure of the said defendant to cause the said automobile to come to a full stop until such mules had passed, the aforesaid mules became greatly frightened and unmanageable and then and there escaped from the control of their driver,, who was then and there using all due care and diligence to restrain said mules, and did then and there so twist about and throw said vehicle, in which the plaintiff was then and there traveling, that the plaintiff was, while using all due care and diligence for his own safety, thrown thence to the ground there with great violence.

3. And for that while the plaintiff, with all due care and diligence, was so traveling upon said highway, the said defendant, so driving the aforesaid automobile, did then and there approach and meet and pass, in said highway, the two certain mules, and the certain wagon in which the plaintiff was then and there traveling, and which the said was then and there driving; and while the plaintiff, with all due care and diligence, as aforesaid, was then and there so traveling upon said highway, in the said wagon drawn by the aforesaid mules, the defendant then and there so maliciously, carelessly and improperly and with so great negligence, drove and managed the said automobile, that by and through the aforesaid negligence and improper conduct of the defendant, the aforesaid mules so driven as aforesaid, became and were greatly frightened, and became and were then and there unmanageable, and then and there escaped from the control of their said driver, who was then and there using all due care and diligence to restrain and control said mules, and did then and there so twist and turn and throw about said wagon that by means thereof the plaintiff was violently thrown out of said wagon upon the ground there with great violence.

By means whereof, then and there, one of the arms of the plaintiff was broken, and one of his legs was greatly injured, and the bones, muscles, blood vessels, nerves and sinews of the right leg, arm and back of the plaintiff were fractured, sprained and lacerated, and he was otherwise greatly bruised, hurt and wounded; and thereby the plaintiff was obliged to and did then and there lay out divers large sums of money, amounting to dollars, in and about endeavoring to be cured of the said injuries so received as aforesaid; and the plaintiff thereby was obliged to and did incur liabilities for sundry and divers other large sums of money, amounting to

dollars, in endeavoring to be cured of the said injuries so received as aforesaid; and also by means of the premises the plaintiff then and there became and was sick, lame and disordered, and so remained for a long time, to wit, from thence hitherto; during all of which time the plaintiff suffered great pain and anguish of body and mind of a permanent, incurable and continuing nature, and was hindered and prevented from transacting and attending to his business and affairs, and lost and was deprived of divers great gains and profits which he might and otherwise would have made and acquired; to the damage, etc.¹⁷²

1554 Frightening horses, noise of machinery, Narr. (Va.)

For this, to wit, that heretofore, to wit, on the day of, 19.., and for many years prior thereto there was and existed a certain public road and highway, in part in the county of, Virginia, in district, in said county, which public road or highway was indifferently called, to wit "..... road," "..... turnpike" and "..... turnpike," and which was adjacent to the lands of and other owners, in said county of, at a place in said county between the city of, and the line dividing said county and county, in said state, the said road extending, generally in said county in an easterly and westerly direction, and was on the date aforesaid, and for many years prior thereto at the place hereinafter more particularly mentioned, in constant and daily use by the public generally for traveling afoot and horseback and in vehicles drawn by horses of ordinary gentleness and training, and other modes of conveyance, in going to and from the populous city of and elsewhere, and to and from other places in said county of and other counties, at, near and beyond the place hereinafter particularly mentioned, at which place, or locality, the public generally, and the plaintiff's intestate in particular, in traveling by means of buggies, carts and other vehicles drawn by horses of ordinary gentleness and training along and upon said public road and highway, had the right to the use thereof for the purposes of travel, free from any dangerous, unusual or extraordinary obstructions, appliances or objects, and especially free from any dangerous, unusual or extraordinary noises therein or so near thereto as would have a tendency and be reasonably calculated to frighten or scare such horses of ordinary gentleness and training, of all of which the defendant well knew or by the exercise of ordinary care could and would have known.

¹⁷² Christy v. Elliott, 216 Ill. 31 (1905).

And the plaintiff further complains and avers that, on, to wit, the day of, 19.., and for many weeks prior thereto the defendant, its agents and servants wrongfully, carelessly and negligently located, placed, built, constructed and maintained upon and within, or partially upon and within, or very near and adjacent to said public road and highway at a place in said county about, to wit, one and miles distant, westerly from the corporate lines of the city of, and about, to wit, of a mile from where said public road crosses the dividing line between said counties of and, which place was, and is, near the property called the property, and where traveling over and along said public road and highway, by the means and in the manner aforesaid, by the general public was daily, constant and frequent, a large plant and structure for the crushing of rock, which plant consisted, in part of a large steam boiler and engine, rock crushing machinery, crusher bin and elevators for transporting crushed rock from said rock crushing machine to the crusher bin, and generated, produced, maintained and used steam by, in and upon said boiler and engine to which engine and boiler were attached large wheels, valves and appliances and connecting belts, and which said boiler was filled, or partially filled with water and steam, used in the operation of said plant which created unusual and extraordinary noises and sounds; and the above mentioned boiler and engine, rock crushing machinery and equipment, and appliances were so located, maintained, situated and placed in, upon or near to said public road and highway, to wit, along, upon and immediately adjacent to the southern side thereof as that they occupied a considerable part thereof, and so that there was left only a narrow passage way for travelers over and upon said public road and highway, and so that horses of ordinary gentleness and training being driven and drawing vehicles occupied by travelers thereover and therealong would necessarily come in close proximity to said steam boiler and engine, rock crushing machinery and the other appliances and equipments above mentioned.**

And the said location of said steam engine, boiler, rock crushing machinery and equipment and appliances aforesaid, so in and upon and adjacent to said public road and highway, and the large and tall boiler and engine, and high rock crushing machinery, equipment and appliances in and upon and near to said public road and highway, were of an extraordinary and unusual appearance, and the noises and sounds made by the steam and water in said boiler and the operations and workings of said machinery and equipment by said defendant were so unusual and extraordinary as that they naturally tended and were well and reasonably calculated to frighten horses of ordinary gentleness and training in use, as afore-

said, for the purposes of travel along said public road and highway, and over and along which the defendant, its officers, agents and servants knew, or by the exercise of reasonable care would and should have known the public generally, daily, constantly and frequently passed and repassed, in vehicles drawn by horses of ordinary and reasonable gentleness.

And the said defendant carelessly and negligently failed and omitted to exercise any proper or reasonable care or precaution to warn persons, and especially the said, who were so traveling over said public road and highway or to guard them in any way against the dangers which defendant knew, or by the exercise of ordinary care would have known, it had created and might reasonably expect to arise and result to the general public in so traveling, and to the said in so traveling, by reason of the location, conditions, appearances and noises, as aforesaid.

And the plaintiff avers that his intestate, the said was on, to wit, the day and date last aforesaid traveling along, over and upon said public road or highway, near the place where the defendant's engine and boiler, rock crushing machinery and other equipments and appliances aforesaid were located, placed, and operated by said defendant, and was coming towards the city of, and carefully driving a horse of ordinary gentleness and training, hitched to and drawing a vehicle or conveyance commonly called a cart, occupied by him, the said; and said horse, by reason of the defendant's recklessness and carelessness in creating and maintaining its said rock crushing machinery and appliances in, upon and near to said public road and highway, and in maintaining and operating the same so that they presented such unusual and extraordinary appearance as naturally tended and were well calculated to frighten horses of ordinary gentleness and training, and in working and operating said plant and thereby producing unusual and extraordinary noises and sounds, upon and near to said public road and highway as would naturally tend and be reasonably calculated to frighten horses of ordinary gentleness and training, and in failing to warn travelers, and said in particular, driving such horses, or horse, of ordinary gentleness and training, or to guard them, or him, against the frightening, and the results of frightening such horses, became and was frightened and scared by the unusual and extraordinary appearances and character of said rock crushing machinery, engine and boiler, equipments and appliances aforesaid, and by the said unusual and extraordinary noises and sounds produced thereby, and by the steam and water in said boiler and engine, and said horse by reason of its said fright reared and plunged and became so unmanageable as that the plaintiff's intestate, the said, was thrown and hurled from said cart to the ground, and was greatly bruised and wounded in

and about his head and other parts of his body and was thereby rendered sick, sore, lame, disordered, and suffered partial paralysis, by reason of which said injuries so inflicted, he afterwards, to wit, on the day of, 19.., died.

2. (Consider first count to double star as here repeated the same as if set out in words and figures.)

And the said defendant maintained, used and operated instrumentalities, pipes and a valve, in connection with its said steam boiler and engine, and which valve was commonly called a safety or pop-valve, which operated and worked automatically, so that the steam which was generated and accumulated in and upon said boiler and engine from time to time, and which the defendant knew, or by the exercise of ordinary care would have known, would and did from time to time accumulate in and upon said boiler and engine, would be and was from time to time automatically ejected, emitted, discharged, and released by said automatic safety or pop-valve in sudden streams, jets and clouds, accompanied by a sharp report and hissing, whistling and penetrating sounds; and the defendant so recklessly, carelessly and negligently placed, located, maintained and operated its said engine and boiler and so recklessly, carelessly, negligently and unnecessarily placed, located, maintained and operated the said automatic safety or pop-valve and pipe attachments that the steam which said safety or pop-valve from time to time ejected, emitted, discharged and released and the hot mist and water therefrom were ejected, emitted, discharged and released in sudden streams and clouds horizontally or laterally across, over, into and upon said public road or highway and about, to wit, five to seven feet from the ground, and the said sudden jettings and streams of steam and clouds of mist produced thereby, and the hissing, whistling and penetrating noises and sharp report produced by the operations of said safety or pop-valve and pipe attachments in the ejection and release of steam were of an extraordinary, unusual and frightening appearance and character, and such as naturally tended and were well and reasonably calculated to frighten, terrify and cause to become uncontrollable horses of ordinary gentleness and training, and thereby liable to cause injury and death to the public generally in traveling upon and along said public road and highway, driving, or riding in vehicles drawn by horses of ordinary gentleness and training, at or near the said place, all of which the defendant, its officers, agents and servants knew, or by exercising ordinary care would have known. And the said defendant also recklessly, negligently and carelessly failed to warn or take any precautions to guard the public generally and especially the said, in so traveling along and over said public road and highway of or against the dangerous conditions aforesaid, which it recklessly and negligently created and maintained, as aforesaid.

And the plaintiff further complains and avers that his intestate,, was, on, to wit, the day of, 19.., traveling along, over and upon said public road and highway as he had a right to do, at or near the place where the said defendant had placed and located and was maintaining its said steam boiler, engine and said safety or pop-valve and pipe attachments, and was exercising due care on his part, and was occupying a cart and driving a horse hitched to and drawing said cart, and which horse was of ordinary gentleness and training, and was passing or about to pass by said engine and boiler, and upon the open passage way of said public road and highway, when there was suddenly ejected, discharged, and released from defendant's said steam boiler and engine, by means of its said automatic safety or pop-valve and pipe attachments, in, across and over and laterally and horizontally across and over said public road and highway, a sudden stream, cloud and gust of steam and hot mist directly in front of, and at, or nearly at, the face, head and foreparts of said horse, and the head and body of said horse were partially enveloped in said stream and hot mist, and at the same time there were produced by said safety or pop-valve and attachments and the escaping steam, hissing and whistling noises and a sharp report near the said horse, which ejected and released steam and hot mist in close proximity to said horse, and which said noises and sounds in like close proximity, were of such an unusual and extraordinary appearance and character as naturally tended and were well and reasonably calculated to frighten and terrify and render uncontrollable the said horse, which was, as aforesaid, a horse of ordinary gentleness and training, and did frighten and terrify said horse, so that said horse plunged and reared and became uncontrollable, whereby, and by reason whereof, the said was, at and near to said place, violently precipitated and hurled to the ground and upon said roadway, and thereby sustained injuries and wounds to his head and body, producing paralysis, lameness, sickness and disorder, from which said wounds and injuries so inflicted the said afterwards, on, to wit, the day of, 19.., died.

And the plaintiff avers that by reason of the premises, as set forth in the foregoing two counts of this declaration, and in each of them, an action hath accrued to the said plaintiff to have and recover damages of said defendant, in pursuance of the statute for such cases made and provided; that he has sustained, is entitled to recover and demands damages in the sum of dollars (\$.....).

And therefore he brings his suit.

1555 Frightening horses, street car whistle, Narr. (Mich.)

For that whereas the said defendant heretofore, to wit, on the day of, 19.., to wit, at the county of in said state, to wit, at the county of in said state, to wit, at the county of in said state, and for a long time prior and subsequent to said date owned, was possessed of, maintained and operated a certain electric interurban railroad, passing through said counties of, and from the city of in said state to the city of in said county of, and state of Michigan, and from said city of to the city of, in said state of Michigan, as well as divers other interurban electric railroads and electric street railroads in divers cities in said state of Michigan, known and designated as the

And that on the date aforesaid, at the township of in said county of, the said defendant being also the owner, in possession of, maintaining and operating said interurban electric railway between said city of and said city of, and between said city of and said city of, as aforesaid, was then and there continually running large numbers of freight and passenger cars propelled by electricity over its said railway between said city of and said city of, and between said city of, and said city of

And the said plaintiff further avers that, on, to wit, said of and as aforesaid, the said defendant's electric railway track was, and still is, located along and within the boundaries of the public highway, and especially that in the township of in said county of, at the place where the injuries and grievances hereinafter mentioned and set forth were committed by said defendant, the said defendant's electric railway track over which its freight and passenger cars then were and still are being operated by electricity, then was and still is situated within the boundaries of a public highway in said township of

And the said plaintiff further avers that, on, to wit, said day of, 19.., large numbers of teams with carriages, wagons and other vehicles carrying passengers, produce and other goods and chattels were continually, rightfully and lawfully passing and repassing over the aforesaid public highway in said township of, in said county of, through and along which said public highway, the said defendant's interurban electric railway track was

located and over which said defendant was then and there continually running large numbers of freight and passenger cars as aforesaid.

And the said plaintiff further avers that, on, to wit, said day of, 19.., he, the said plaintiff, was driving over and along the said public highway in said township of, in said county of, over and along which said public highway the electric interurban railway tracks of said defendant were located as above set forth, with a pair of safe, well broken horses attached to a wagon in and with which said plaintiff was taking divers persons and personal property to said city of; and with all due care and diligence on the part of said plaintiff, and without any fault or negligence whatever on his part; that while so driving along said highway as aforesaid, in said township of in said county, the said defendant, by its servants, agents and employees, ran one of its freight cars and also one of its passenger cars over and along said track, and passed the team so being driven by the said plaintiff.

That it then and there became and was the duty of the said defendant, its servants, agents and employees in running its said cars over and along said railway track as aforesaid, not to unnecessarily sound the whistle on said cars and not to frighten the said plaintiff's team by sounding said whistle; and also it became, and then and there was the duty of the said defendant, its servants, agents and employees to use due and proper care and reasonable diligence and care in running said cars so as not to frighten the team of said plaintiff while driving along said highway as aforesaid, and if said team did become frightened by said cars or the whistle, it then became and was the duty of said defendant, its agents, servants and employees to stop said car and not to sound said whistle until said plaintiff could get his said team under control.

And the said plaintiff further avers that, on, to wit, said day of, 19.., at the township of, in said county of, the said defendant wilfully and maliciously, with intent to frighten the team so being driven by said plaintiff over and along said highway, did run one of its said passenger cars past the team of said plaintiff so as aforesaid then and there being driven along said highway by said plaintiff, and when a short distance behind said team, said defendant, by its servants, agents and employees, maliciously, negligently and wilfully and without any reason or cause for so doing, sounded the whistle of said car in such manner as to frighten the horses of said plaintiff so being driven along said highway by said plaintiff; that said plaintiff then and there exercised and employed all due, proper and reasonable care and diligence on his part to hold and control said team, and did get said team under full and

complete control; that after said plaintiff had so got said team under his control, and as said car was passing said team on said highway as aforesaid, the said defendant, by its agents, servants and employees, again sounded said whistle, without any reason or cause therefor, a large number of times for the express purpose of frightening said team and of injuring said plaintiff; that at the time said whistle was sounded as aforesaid, said car was not approaching any crossing nearer than one and one-half miles from the point where said whistle was sounded; and there was no reason whatever for the said defendant, by its said servants, agents and employees, to sound said whistle; that the said defendant, its agents, servants and employees, then and there well knew at the time said whistle was sounded as aforesaid, that said plaintiff's team was frightened and liable to run away on account of the repeated sounding of said whistle.

Yet, the said defendant, by its agents, servants and employees, disregarding its duty as aforesaid, wilfully, maliciously, wantonly and negligently continued to sound said whistle after it, the said defendant, its agents, servants and employees well knew that the plaintiff's said team was being frightened by said whistle and the passing of said car, and did not stop or attempt to stop said car or cease to sound said whistle until said team of said plaintiff was so frightened that it was impossible for said plaintiff to control and manage said team.

And the said plaintiff further avers that by reason of the aforesaid, wilful, malicious, wanton and negligent acts of the said defendant, its servants, agents and employees as aforesaid, in negligently sounding said whistle as aforesaid, at the time and place aforesaid, the same team of the said plaintiff then and there became frightened and ran away from the control of said plaintiff and overturned said wagon, and with great force and violence, the said plaintiff was thrown from said wagon and greatly bruised and injured; that said wagon was totally and entirely destroyed; that the said plaintiff was severely injured in his head, face, shoulders, arms, hands and fingers; that his skull was fractured, his shoulder severely bruised and injured, his nose broken, his cheek bone broken and displaced, his skull broken and displaced, his hands and fingers severely bruised, the skin and flesh on his face and forehead being lacerated and torn away; by reason whereof, the said plaintiff then and there suffered, and from thence to the present time has continued to suffer great pain and anguish of mind and body for his life time on account of the permanent character of his said injuries; that from the time of receiving his said injury as aforesaid, he has been and still is, by reason thereof, sick, sore, lame and disordered, and has been thereby prevented from carrying on his usual affairs and business; and on account of the permanent character of

his said injury, he will for his life time be prevented from carrying on and performing his usual affairs and business; that he has been compelled, and will continue to be compelled to pay out and expend large sums of money for care, nursing, medicine, medical attendance and surgical attendance, and operations in attempting to be relieved and cured of his injuries; that the said wagon was and is totally destroyed and worthless; that by reason of said injury there remains, and for his life time will continue to remain, a long and large scar and disfigurement of his face and person; that on account of the frightening of said horses as aforesaid, said horses have become nervous, easily frightened, and unsafe, and are worth a large sum of money less than they would have been if they had not been so frightened by the negligence of the defendant as aforesaid, by reason of which and whereby the said plaintiff has suffered damages in a large amount, to wit, in the sum of dollars, and therefore he brings suit.

1556 Hazardous occupation, action, damages

The employment of a child in a hazardous occupation which results to his personal injury impliedly renders the employer liable under the statute to an action by the child for damages, notwithstanding that the child might have misrepresented his age at the time of his employment. The provision of the statute which creates this action is valid.¹⁷³ An employer is liable for injury sustained by a minor regardless of whether he knew the true age of the minor or the misrepresentation by the minor of his age at the time of the employment.¹⁷⁴ A parent estoppes himself from recovering damages for the loss of time and inability to work of a minor child, by bringing an action for the minor's injuries in his name as next friend and claiming damages for loss of time, etc.¹⁷⁵

1557 Hazardous occupation, Narr. (Ill.)

For that whereas, the defendant, the, a corporation, was, on the day of, 19.., operating and managing by its agents and employees, a certain or manufacturing establishment, in the city of and the county of and state of Illinois, in which said mill, steel of various kinds was manufactured for sale, which said business was a gainful occu-

¹⁷³ *Beauchamp v. Sturges & Burn Mfg. Co.*, 250 Ill. 303, 305, 311 (1911); Sec. 11, Child Labor law (Hurd's Stat. 1909, p. 1082).

¹⁷⁴ *American Car & Foundry Co. v. Armentraut*, 214 Ill. 509, 514 (1905).

¹⁷⁵ *American Car & Foundry Co. v. Hill*, 226 Ill. 227, 236 (1907).

pation to the defendant; that in said mill, for carrying on the said business, said defendant had certain machinery and appliance consisting of engines, shafting, pulleys, belts, furnaces, straighteners, rollers and other machinery operated by steam power.

And the plaintiff avers that on the day and year aforesaid, he was * under the age of sixteen years * ¹⁷⁶ and was then and there unlawfully employed by the defendant at its said mill or manufacturing establishment, under the direction and control of a foreman of the defendant, said foreman having control and authority over the plaintiff, and standing to the plaintiff as the representative of the defendant, their common master; that the plaintiff was put to work by the said foreman to operate steam machinery, to wit, to straighten angle bars by feeding them into or running them through a straightener; that said straightener was a machine constructed of steel and iron, consisting of heavy steel rollers about feet long and about to inches in diameter, three of the smaller rollers being directly above the tangency of the four larger rollers, the four larger rollers having grooves circling the rollers about or inches apart, through and into which the angle bar was fed or pushed and held in place by the three upper rollers, around which upper rollers, and directly above the grooves, were projecting bands or collars to fit the grooves, all of which rollers were at each end run in boxes or bearings firmly attaching the two frames; that the four lower rollers by a combination of gears, were geared to a shaft which carried a pulley connected to a line shaft run by steam power, by means of a belt, which revolved the rollers towards each other at about sixty revolutions a minute, so that the angle bar, when pushed into one of the grooves, was caught by the rollers and carried through the machine and straightened; * that said work was extra hazardous employment,* whereby the plaintiff's life and limbs were in danger.

By means of the premises, and while the plaintiff was so operating said machine, his left hand and arm and the first finger of the right hand came in contact with a certain part thereof and were drawn into said rollers, thereby crushing and mangling the said left hand and arm of the plaintiff, and the said first finger, so that the said arm had to be amputated between the elbow and the shoulder, and the said first finger amputated above the second joint, and other parts of the body of the plaintiff were bruised and wounded and his life despaired

¹⁷⁶ The foregoing count is under section 38, chapter 48, Hurd's Revised Statutes. A count under section 33 *Ibid.* may be drawn in similar language as above by averring that the plaintiff was "under the

age of fourteen years" instead of sixteen, etc., and omitting the phrase, "which said work was an extra hazardous employment" as indicated by stars.

of, and he became sick, sore, lame and disordered and permanently injured, and so remained for a long space of time, to wit, from thence hitherto, and will so remain permanently crippled, during all which time he thereby suffered great pain, in body and mind, and was and will be hindered from transacting his business and affairs; that his injuries were the direct result of said unlawful employment, and that said unlawful employment was the proximate cause of his injuries.

Wherefore, etc.

b

For that whereas, on, to wit,, 19..., the defendant,, a corporation, was engaged in the manufacture of tin, tin-ware and other metal products, and then and there used in the manufacture of its said metal products certain stamping machines operated by steam power, for use in stamping sheet metal, tin-ware and other metal products, and the plaintiff herein was in the employ of the defendant and was engaged at work on divers of the machines so as aforesaid used by the defendant at its said factory at, to wit, number street, in the city of county of and state of Illinois; that, on, to wit, the date aforesaid, while the plaintiff was employed by said defendant and while plaintiff was then and there a minor, under the age of years, the said defendant then and there directed the plaintiff to go to work and operate a certain machine known as a punch press, which said punch press was then and there being used by the defendant in the defendant's said factory in stamping certain sheets of metal and which said punch press was then and there being operated by steam power; and that there was then and there in full force and effect a certain statute theretofore passed by the legislature of the state of Illinois, which said statute is known as paragraph 15, chapter 48, Revised Statutes of Illinois, which said statute is in words and figures following, to wit: (Insert statutory provision).

That the said defendant well knowing the premises did then and there, on, to wit, the date aforesaid, in violation of said statute direct the plaintiff herein to operate, manage and control said punch press and to stamp the said sheets of tin upon said punch press, and while so engaged at his work for the said defendant, the plaintiff then and there, without fault on his part, and while in the exercise of all due care and caution for his own safety in operating said punch press and by reason of the violation of the statute aforesaid by the defendant, had his right hand caught in said punch press, and the plaintiff's right hand was then and there and thereby greatly crushed, wounded, and injured and divers of the bones and fingers of the plaintiff's right hand were then and there so

injured and mangled that amputation thereof became and was necessary; and the plaintiff was otherwise injured and his right hand, wrist and arm are, and in the future will be permanently injured and disabled; and he has suffered great pain and anguish of body and mind and he will in the future continue to suffer great pain and anguish of mind and body; and the plaintiff has been otherwise injured and has sustained damages in the sum of dollars.

.....

By
his next friend.

By
his attorney.

(Michigan)

For that whereas, heretofore, to wit, on the day of, 19.., at the city of, in said county, the said defendant was a manufacturing corporation with a plant at avenue, in the city of, said plant facing on avenue, and being between said avenue and the railroad, and the said plaintiff at the time aforesaid was an employee of the said defendant charged with the duty of doing such work at the said plant as he should be directed to do by his foreman, and other superiors and officers of the said defendant; that plaintiff was at the time aforesaid, an infant under sixteen years of age, to wit, of the age of years; that among other duties devolving upon the plaintiff, and the work that he was actually doing at the time he received the injuries hereinafter referred to, it was his duty to wheel castings from the front to the rear portion of said plant, which was for him heavy and laborious work, he being required to move said castings from place to place by means of a wheel-barrow.

And the plaintiff avers that on said day of, 19.., he was charged with the duty of moving heavy castings by means of a wheel-barrow, and by reason of the premises it became and was the duty of the said defendant to furnish plaintiff a reasonably safe place in which to do his work, and to furnish plaintiff a reasonably safe passageway through which to push said wheel-barrow loaded with castings.

Yet, the said defendant, well knowing the premises, did not regard said duty or duties, or either of them, but on the contrary wholly disregarded the same, and wholly failed to furnish plaintiff a reasonably safe place in which to perform his work, and wholly failed to furnish plaintiff a reasonably safe way through which to push his wheel-barrow so loaded as aforesaid, and permitted said passageway to become obstructed with castings, and the plaintiff was required to push said wheel-barrow through a temporary and unusual

passageway, which was not sufficiently wide to permit the reasonably safe passage of said wheel-barrow through the same, and which said last mentioned passageway led immediately by a certain dangerous emery wheel, which was wholly unprotected and unguarded, thereby rendering said passageway extremely dangerous, of all of which the said defendant, by its proper agents and officers had due notice and full knowledge, and of all of which the said plaintiff, by reason of his youth and inexperience was wholly ignorant.

2. That on the day and date aforesaid said plaintiff was engaged in the actual discharge of his duty and in the obedience of orders, and he charges that by virtue of section 5344 of the Compiled Laws of the state of Michigan, 1897, by reason of the fact that he was under sixteen years of age, the said defendant was in duty bound to desist and refrain from putting plaintiff at any employment whereby his life or limb would be endangered, or his health likely to be injured.

And the plaintiff avers that he was at the time under the age of sixteen years, to wit, of the age of years; and that notwithstanding said statute and the duty imposed upon the defendant thereby, said plaintiff was required to push a wheel-barrow loaded with castings through a narrow and dangerous temporary passageway, passing by an unguarded and unprotected emery wheel.

And the plaintiff avers that on the day aforesaid, at the place aforesaid, he was pushing a wheel-barrow load of castings from the front to the rear portion of the plant of the said defendant through said temporary passageway; that he was at the time in the exercise of due care and caution, and all the care and caution of which he was capable; that he was wholly free from negligence that he understood and appreciated; and that while so engaged in said work the front of said wheel-barrow became entangled and obstructed with said castings and obstructions, and while attempting to extricate the same, without any fault or negligence on his part, and wholly through the fault and negligence of the said defendant, by its officers and agents, in the manner aforesaid and for the reasons aforesaid, the back part of his right hand came in contact with said unguarded and unprotected emery wheel and was burned and ground by the same, and injured to such an extent that although the same has been operated upon and treated on four different occasions, plaintiff has not yet recovered from said injury; and plaintiff avers that said injury to said hand is of a permanent character, and that he will never fully recover from the same; that in consequence of said injury he has suffered the most excruciating pain and distress, and must suffer like pain and distress in the future indefinitely; that in consequence of said injury he became sick, sore, lame and disordered, and will be so sick, sore, lame

and disordered indefinitely; that he has been permanently deprived of his capacity to earn money and wages with his hand, and that the scar and disfiguration will be of a permanent character, and has caused plaintiff to suffer great mental pain on account of said disfiguration of his hand, and will cause him to suffer like pain in the future indefinitely; and that he will never be restored to the full use of his said right hand; and the plaintiff has been otherwise greatly and seriously injured. To his damage, etc.

1558 Independent contractor, action, respondeat superior

An independent contractor is he who contracts to do a specific piece of work by furnishing his own assistants and by executing the work either entirely in accordance with his own ideas or in accordance with a plan previously given to him by the person for whom the work is to be done, but not being subject to his orders in respect to the details of the work, and regardless of the manner of paying for the same.¹⁷⁷

Persons who are employed to superintend the construction of different classes of work for which they are supplied material and who employ men with their employer's money to do the work, are not independent contractors of the persons whom they employ to do the work, and the persons employed to do the work are the servants of the persons who employ the superintendents.¹⁷⁸

Persons engaged in the construction of a building owe to others engaged in the same work, a duty to use reasonable care to avoid injury.¹⁷⁹ A corporation is liable for the wrongful act of an independent contractor who exercises, with the consent of the corporation, some charter power or privilege of the corporation, or where the corporation, having a public or statutory duty to perform, permits an independent contractor negligently to perform that duty. Every act of a corporation is done under its charter in the sense that if there was no corporation, it could not have performed the act; but if the act is one which might have been done by an individual, no different rule obtains as to liability merely because there is a corporation. A corporation is not liable for the negligence of an independent contractor

¹⁷⁷ *Linguist v. Hodges*, 248 Ill. 491, 501 (1911).

¹⁷⁸ *Linguist v. Hodges*, 248 Ill. 502.

¹⁷⁹ *O'Rourke v. Sproul*, 241 Ill. 576, 580 (1909).

where there is only a right of general supervision and inspection that the contract shall be performed.¹⁸⁰

The principle of *respondeat superior* has no application to independent contractors where the party for whom the work is done is not the immediate superior of those who are guilty of the wrongful act and where he has no control over the manner of doing the work under the contract, unless the contract directly requires the performance of work intrinsically dangerous, however skillfully performed, or unless an individual or a corporation does work pursuant to a special franchise, or unless a municipal corporation contracts for the making of a public improvement under the supervision of its own engineer or other proper officer and subject to his orders.¹⁸¹ A municipality is not liable for the negligence of an independent contractor while in the performance of a duty which is in no way devolved upon it.¹⁸²

1559 Independent contractor, Narr. (Ill.)

For that whereas, the defendant,, is a corporation duly organized and existing under the name by which it is herein sued; that on or about, 19..., it was by and through certain servants performing certain work and labor upon and about a certain fire escape on the, near the intersection of street and boulevard, which said fire escape was wholly in said boulevard, a public street in the city of, Illinois; that the plaintiff was employed by certain contractors doing business under the firm name of , who were also performing certain work and labor about said ; that plaintiff was on said date, while in the performance of his duties, and while exercising due care and caution for his own safety, required to be on a certain other fire escape which the defendant was putting up as a contractor and which was also wholly in said boulevard, and directly underneath the aforesaid fire escape upon which the said servants of the defendant were then and there working; that while he was so there in said position, the said servants of the defendant, did carelessly and negligently and unlawfully cause and permit a large iron drill to fall from where they were working as above stated, and that the same struck the plaintiff on the head, and thereby fractured

¹⁸⁰ Boyd v. Chicago & Northwestern Ry. Co., 217 Ill. 332 (1905).

¹⁸² Thompson v. West Bay City, 137 Mich. 94, 99 (1904).

¹⁸¹ Chicago v. Murdock, 212 Ill. 9 (1904).

his skull, and he was thereby greatly and grievously injured both physically and mentally; that he has been and will be hindered and prevented from performing his usual occupation and employment; that he has and will suffer great pain and mental anguish, and has and will be required to spend large sums of money for medical aid and attention. To his damage, etc.¹⁸³

b

For that whereas the defendant is a corporation duly organized under the name by which it is herein sued, and engaged in the building construction business, and on or about, 1..., was engaged in certain construction work on what is known as the building, between and, near street,,

And the plaintiff was on said date working as a laborer in the basement of said building for another contractor, to wit,, who was also doing certain construction work on said building. And the defendant knew, or should have known, that plaintiff was then and there so working. And the said defendant prior to the day aforesaid, carelessly, negligently and unlawfully built and constructed a certain floor or scaffold about five or six feet wide and sixteen or eighteen feet long, on, to wit, the fifth floor of said building above the point where the plaintiff was on the date aforesaid working, in a dangerous and unsafe manner, and in a way that rendered it liable to tip up or collapse, and drop material on to the people and the plaintiff working below, all of which defendant knew, or should have known, in that the defendant did not put a firm and secure plank or support under one end of the said floor or scaffold, but did simply nail a cleat five or six feet long on to one side of a plank and rest one end of the boards composing said floor or scaffold upon said cleat; that on said plank on the side of which the said cleat was nailed rested a certain derrick, which for the time made said plank firm, which derrick was owned and operated by a certain other contractor, to wit,, which was doing the iron construction work on said building, and which plank was placed there by the said for the sole and only purpose of resting the sill of said derrick upon and which derrick would in the course of the work be required to be removed in a few days. That the defendant knew, or should have known, that the said would soon be required to remove said derrick to an upper floor, and that as soon as it was so removed and the weight taken off said plank

¹⁸³ Langan v. Enos Fire Escape Co., 233 Ill. 308 (1908).

that the said floor or scaffold would not carry any large amount of weight, but if any considerable weight was placed on the end of said floor or scaffold it would tip down; and the defendant knew, or should have known, that prior to the date aforesaid, the said derrick had in the course of the work been removed to an upper floor, and that one end of said scaffold was insufficiently supported, and that the same was dangerous and unsafe; and yet said defendant allowed said derrick to so remain there with rubbish, brick and material and short planks lying upon the same, and did not secure, make safe, or otherwise support said end of said floor or scaffold. That the defendant knew, or should have known, that workmen about said building were likely to walk upon said floor or scaffold. That it was usual and customary for workmen to walk upon any of the floors and scaffolds in said building, and on the day aforesaid one of the workmen employed in the construction of said building did walk on to said floor or scaffold, it being then and there in the condition above stated, and that when his weight was added to the weight already on said floor or scaffold, the aforesaid end thereof tipped down a distance of, to wit, four or five feet and a large amount of the material thereon and a piece of plank was precipitated and thrown therefrom, and the said piece of plank fell, to wit, six stories and struck the plaintiff upon the right shoulder with great force and violence, and he was rendered unconscious, and his shoulder blade was broken, and thereby he was made sick, sore, lame and disordered and otherwise was permanently injured, and made to suffer great pain and mental anguish, and rendered unable to perform his usual occupation and employment. To the damage, etc.¹⁸⁴

1560 "Jim Crow" car, white person compelled to ride in, Narr. (Va.)

For this, to wit, that before and at the time of the committing the grievances herein mentioned, the said defendant was a common carrier of passengers for hire and reward in and by certain trains of railway cars from county to county; and while the said defendant was such common carrier of passengers aforesaid and operating a line of cars with white and colored people apart as required by law, the said plaintiff, who is a white married woman over twenty-one years of age, heretofore, to wit, on the day of at the special instance and requests of said defendant, became and was a passenger in and upon the train of the said defendant to be comfortably, conveniently and safely carried as a white

¹⁸⁴ Flanagan v. Wells Bros. Co.,
237 Ill. 82, 88 (1908).

passenger thereby on a certain journey, to wit, from to as aforesaid over the said defendant's road for a certain fare and reward to the said defendant in that behalf, and the said defendant then and there received the said plaintiff as such passenger to be carried as aforesaid.

And thereupon it became and was the duty of the said defendant to transport the said plaintiff as a white passenger in a separate car or apartment set part by the said defendant company for white passengers, from to and for the conductor of the said defendant to act in good faith to seat her in the car thus set apart, as provided by law.

Yet, the said defendant not regarding its duty in that behalf, through its conductor, did not in good faith seat, but on the contrary, knowing, or by the exercise of proper care could have known, that the plaintiff was a white person, failed and refused to give her a seat in the car set apart and occupied by white passengers for said journey, in this that the said plaintiff, upon boarding said train, undertook to go in the car set apart for white people along with other white people, who got on said train at said station, but the said conductor not acting in good faith as aforesaid, and knowing said plaintiff to be white, or could have known by the exercise of proper care, ordered her to the car set apart for the colored people, and the said plaintiff on taking her seat and realizing that she was in the colored car, immediately undertook to depart therefrom, but the said conductor demanded her to keep her seat and arrested and imprisoned the said plaintiff in said colored car, in which she had to remain in what is known as the "Jim Crow" car, in a seat among seats occupied by colored people, until she had reached, at which place she was released; that said colored car at the time and during the continuation of the whole journey, to wit, from said station to contained and was occupied by colored passengers or persons of African descent.

And by reason of said action of said defendant, through its conductor, the said plaintiff was greatly humiliated and insulted, and compelled to bear all of the injuries, unpleasantness, hardships, inconveniences, discomforts, humiliations, indignities and fatigues which are and were the very reasons of the separation of the colored race from the white race upon the railroad trains; and the said plaintiff became nervous and sick and disordered, and so remained and continued for a long space of time, to wit, from the day of, to the present, during all of which time, the said plaintiff thereby suffered and underwent great pain, and being a married woman over twenty-one years of age and transacting business of her own she was hindered and prevented from per-

forming and transacting her necessary affairs and business, and did necessarily pay out money in and about endeavoring to be cured of her nervous injuries occasioned by the said defendant as aforesaid. And other wrongs the said defendant did to the said plaintiff to the great damage of the said plaintiff, and against the peace of the commonwealth. Wherefore, etc.

1561 Ladles, adjusting, Narr. (Ill.)

For that whereas, heretofore, to wit, on , 19... to wit, at the county aforesaid the defendant.. w.... possessed of and using and operating certain ladles or receptacles for molten metal which were moved upon cars or wheels along a track of which the defendant.. w.... also then and there possessed and w.... using; and it then and there became and was the duty of said defendant.. not to permit and cause said ladles or receptacles for metal to be moved nor to bring anything into contact with the same while the laborers in its employ were adjusting said ladles or receptacles for metal. And the plaintiff avers that on the day and year and at the place aforesaid he was a laborer in the employ of the defendant.. and was in the discharge of his duty by means of certain appliances engaged in adjusting one of said ladles or receptacles for metal, when the defendant.. without fault or negligence on the part of the plaintiff carelessly, negligently, wilfully and wantonly in the night time, and without notice to the plaintiff, by means of certain car ladles or engines moving on wheels along said track moved said ladle or receptacle for metal which the plaintiff was then and there engaged in adjusting violently forward so that the same without fault or negligence on the part of the plaintiff and by reason of the careless, negligent, wilful and wanton misconduct of the defendant.. then and there ran upon and struck violently against the plaintiff.

By means of which said plaintiff was greatly cut, bruised and wounded and rendered permanently sick, sore, lame and disordered and one of the plaintiff's (Describe specific injuries). And the plaintiff by reason of the premises suffered great and excruciating agony and pain and will permanently suffer the same in the future and the plaintiff's spine was permanently injured and his nervous system greatly shocked and permanently shattered. And the plaintiff was put to great expense, to wit, dollars for medical attendance, medicines and nursing in an endeavor to be cured of the injuries aforesaid and will permanently in the future be compelled to make like expenditures for the same purpose. And also by reason of the premises the plaintiff has been from thence hitherto and will permanently in the future be hindered and prevented from attending to his lawful and necessary affairs and busi-

ness and has been permanently crippled and rendered unable to work. And also by reason of the premises the plaintiff has been and is otherwise greatly injured and damaged, to wit, at the county aforesaid. Wherefore, etc.

1562 Ladles, incompetent servant, Narr. (Ill.)

For that whereas, the defendant, heretofore, on, to wit, the day of, at, in the county of and state of Illinois, was engaged in the foundry business in the manufacture of various articles of iron and metals, connected with a certain plant which it there had for that purpose; that it then and there had certain ladles, vessels or pots, with appliances attached thereto, used by it in its said business, filled with metal in a molten state, slag and other substances, in a dangerously high and heated temperature and condition; that he was then and there employed and engaged by said defendant to work in and about said manufacturing business of said defendant as a molder; that being so employed, the plaintiff and the servants of the defendant were then and there on the day and year aforesaid, ordered and directed by a signal to go to a certain vessel or ladle for the purpose of making certain molten metal therefrom, to be used by said plaintiff and the servants of said defendant in molding certain shoes or other manufactured articles in and about the business of said defendant.

And it then and there became and was the duty of said defendant to operate, conduct and manage said foundry business in a careful manner and to employ for that purpose competent, sober and careful servants, who would use due care and caution while handling and operating said ladles filled with molten metal, for the safety of those then and there engaged in the business of said defendant. Yet the defendant in utter disregard of its duty in that behalf then and there negligently and carelessly employed an incompetent, careless and reckless servant, and suffered and permitted such incompetent servant of said defendant to work, operate and manage said ladles filled with molten metal as aforesaid, of which incompetency of said servant the defendant knew or by the exercise of reasonable diligence might have known, and which was unknown to the plaintiff.

By means whereof, while the plaintiff was engaged as aforesaid, and exercising due care and diligence for his safety, the defendant then and there by its said servant or servants so wrongfully, carelessly and negligently worked with and operated said ladle filled with metal in a dangerously high and heated temperature as aforesaid, that it caused said metal or substance in said ladle to spill, flow and explode to and upon the ground, whereby said metal and substance was then and there thrown with great force and violence to and against the

head, chest, abdomen, limbs and various parts and portions of the body of said plaintiff; by means whereof, said plaintiff's head was fractured, chest broken, and the whole body of the said plaintiff was injured and skin and flesh of various parts of the person and body of the plaintiff were then and there severely burned, scalded, torn, lacerated, and injured; and by reason of the said injury so received as aforesaid, the brain of said plaintiff was then and there exposed, and injured and various parts of his body and person were then and there bruised, sprained, injured, fractured and broken, thereby and therefrom causing plaintiff to then and there become and he was sick, sore, lame and disordered and he so remained from thence hitherto, and he will ever so remain, during all of which time the plaintiff suffered great and exruciating mental pain and anxiety, and he will ever so suffer; and in consequence of said injuries he was then and there permanently injured and disabled from following his said employment and to do the work aforesaid, or any kind of work, and by reason thereof, he was then and there and will be permanently deprived of his means of support; and by means of the premises, the plaintiff was forced to and did lay out divers sums of money and incurred divers large indebtednesses amounting to, to wit, the sum dollars in and about endeavoring to be cured of his wounds, hurts and bruises occasioned as aforesaid; and the plaintiff was otherwise permanently injured by reason of the negligence of said defendant in the manner and form as aforesaid, to the damage, etc.

1563 Ladle oven, collapse, Narr. (Ill.)

For that whereas, heretofore, to wit, at and before all the times hereinafter mentioned the said defendant.. w..... possessed of and operating a foundry in the city of, in the county of and state of Illinois, aforesaid, and in connection therewith had a small room called to wit, the ladle oven, which it was the duty of said plaintiff, who was then and there one of the servants of said defendant.., to occasionally enter as such servant, and which said room had a cover or roof with heated sand thereon, which it was the duty of said defendant.. to keep in a safe condition so as not to be dangerous to the servants of said defendant..., whose duty it was to enter said room; yet, said defendant.. well knowing the premises, but not regarding ..h.. duty in that behalf, permitted said cover or roof to become and remain unsafe so that by reason thereof, on, to wit, the day of, and without any negligence on the part of said plaintiff a portion of said cover or roof, together with the heated sand thereon fell upon said plaintiff, who in the discharge of his duty as such servant had with all due care and

diligence on his part just entered said room, and said plaintiff was thereby then and there injured as hereinafter alleged.

2. And whereas also, heretofore, to wit, at and before all the times hereinafter mentioned, said defendant . .w.. possessed of and operating a certain other foundry in, to wit, the city of, in the county of and state of Illinois aforesaid, and in connection therewith had a small room, called, to wit, the ladle oven, which it was the duty of the said plaintiff, who was then and there one of the servants of said defendant.., to occasionally enter as such servant, and which said room had a cover or roof with heated sand thereon, which it was the duty of said defendant.. and ..h.. then superintendent and foreman to keep in a safe condition so as not to be dangerous to the servants of said defendant.., whose duty it was to enter said room; yet, said defendant.. through ..h.. then foreman who then and there had the charge and control of certain servants of said defendant.. including said plaintiff, and whose duty it was to direct said last mentioned servants including said plaintiff in the performance of their services and in the doing of their work for said defendant.. and in the discharge of their duties in and about said ladle room, well knowing that said roof or cover on said ladle room had become unsafe and was likely to fall upon any of said last mentioned servants including said plaintiff, who might from time to time enter said ladle room, there, on, to wit, the day of, failed to warn said plaintiff that the said roof or cover of said ladle room had become unsafe, and was likely to fall; by means whereof, as said plaintiff, in the discharge of his duty and without any notice of said danger, and with all due care and diligence on his part, had entered said ladle room, he was then and there struck by a portion of said roof or cover with the heated sand thereon, which fell upon said plaintiff while he was so in said ladle room in such a manner that said plaintiff's head and left arm were badly bruised and injured and said plaintiff was badly burned by said heated sand in and about his head, face, arms, hands and feet; and said plaintiff's left arm and portions of his body were permanently injured and his face, arms, hands and feet were permanently disfigured by reason of the premises; and by reason thereof said plaintiff underwent great pain and suffering, and expended a large sum of money, to wit, dollars, in and about endeavoring to be cured of his said injuries, wounds, hurts and bruises; and was thereby prevented for a long space of time, to wit,, from attending to his usual work and occupation, and lost the earnings which otherwise would have accrued to him therefrom, to wit, dollars; and said injuries were of such a serious and permanent nature that said plaintiff has been much weakened in his strength and ability to work or earn wages therefrom, and in consequence thereof has lost a large sum

of money, to wit, dolars, which he would otherwise have been able to earn if he had not sustained such injuries; and said plaintiff will never be able to do as hard work nor earn as large wages as he was doing and earning before he received such injuries by reason of the premises.

Wherefore, etc.

1564 Ladles, spattering, not warned, Narr. (Ill.)

For that whereas on, to wit, the day of, 19..., at the city of, in the county of and state of Illinois, the defendant was engaged in the manufacture and reduction and shaping of iron and steel and other metals, and was then and there possessed of and was using and operating a certain large vessel or receptacle, commonly known as a vessel, used in said manufacturing and reduction of iron and steel and other metals aforesaid; that in such use and operation of said vessel or receptacle aforesaid the same contained a large amount of iron, steel, slag, and other substances in a semi-liquid and molten state and heated to a dangerously high temperature and condition; that at a certain time, point or stage in said use and operation of said vessel and receptacle, certain particles of said iron, steel, slag, and other substances, so heated as aforesaid, were liable and apt to, and in the ordinary course of said business would then and there be hurled and thrown, and would fly and spatter from and out of said vessel and receptacle aforesaid to a great distance from the same, to wit, the distance of feet, thereby endangering the lives and limbs of persons working at and near the same and within said distance aforesaid of the same; that at another time, point or state in said use and operation of said vessel or receptacle aforesaid, the said substances aforesaid or any part thereof would not be hurled, thrown and spattered around and over the same; all of which facts aforesaid the defendant then and there ought to have known and knew.

And the plaintiff further avers that he was then and there in the employ of the defendant as a common servant for hire, and as such was then and there engaged in and about his work and employment at and near said vessel or receptacle aforesaid and within said distance of, to wit, feet of the same, and was in the exercise of ordinary care for his own safety.

And the plaintiff further avers it then and there became and was the duty of said defendant to have notified and warned the plaintiff that said time, point or stage in said use and operation of said vessel and receptacle aforesaid was about to be reached, when said particles aforesaid were apt and liable to, and in the course of said business would then and there be hurled and thrown and would fly and spatter from and out of said vessel and receptacle aforesaid, so that the plaintiff

might have a reasonable opportunity to adopt such measures as would protect himself from said particles being hurled, thrown and spattered from and out of said vessel or receptacle as aforesaid.

Yet, the defendant, did not regard its duty in that behalf, but on the contrary thereof then and there carelessly and negligently failed to warn and notify the plaintiff of that said time, point or state in said use and operation of said vessel and receptacle aforesaid was about to be reached, when said particles aforesaid were apt and liable to, and in the ordinary course of said business would then and there be hurled and thrown, and would fly and spatter from and out of the vessel and receptacle aforesaid, so that the plaintiff might have a reasonable opportunity to adopt such measures as would protect him from said particles so being hurled and thrown and spattered from and out of said vessel or receptacle as aforesaid; by means and in consequence whereof, while the plaintiff was then and there in the exercise of reasonable and ordinary care for his safety, so engaged and employed as aforesaid and unaware of the fact that said time, point or stage in said use and operation of said vessel and receptacle aforesaid, when said particles aforesaid were apt and liable to, and in the course of said business would then and there be hurled and thrown and would fly and spatter from and out of said vessel and receptacle aforesaid, was about to be reached and was reached, so that the plaintiff might have a reasonable opportunity to adopt such measures as he should think proper to protect himself from said particles so being hurled and thrown and spattered from and out of said vessel or receptacle, the said particles of said substance as aforesaid were then and there hurled and thrown and did fly and spatter from and out of said vessel and receptacle aforesaid around and against the plaintiff and into the eye of the plaintiff without the plaintiff having a reasonable opportunity to adopt and without having adopted such measures as he might deem proper to protect himself from said particles so being hurled and thrown and spattering and flying from and out of said vessel and receptacle as aforesaid.

2. And the plaintiff further avers that it then and there was the usage and custom of the defendant that whenever the time, point or stage when said substances would be so hurled and thrown and would fly and spatter from and out of the vessel and receptacle aforesaid was about to be reached, a warning of the fact that said time, point and stage was apt to be reached was then and there given and a certain whistle was then and there blown; that the plaintiff then and there knew of said custom, and relied thereon for the protection of himself against said particles so being hurled, thrown and spattered from and out of said vessel and receptacle aforesaid; all of which facts the defendant ought to have known and knew; and that it then and there became and was the duty of the

said defendant to have notified and warned the plaintiff that said time, point and stage aforesaid was about to be reached, and to have blown said whistle as aforesaid prior to the reaching of said time, point and stage as aforesaid, so as not to unnecessarily endanger the life and limbs of the plaintiff and other persons then and there so engaged as aforesaid.

Yet, the defendant did not regard its duty in that behalf, but on the contrary thereof then and there carelessly and negligently, and contrary to said usage and custom aforesaid, failed to warn and notify the plaintiff as was usual and customary as aforesaid, and failed to blow said whistle as aforesaid prior to the reaching of said time, point and stage aforesaid; by means and in consequence whereof, the said substances so being hurled, thrown, spattered, and flying at said time, point and stage aforesaid, then and there struck upon and against the body and limbs of the plaintiff and into the eye of the plaintiff.

By means and in consequence whereof the sight of said eye was destroyed, and the other eye severely injured, and he was otherwise greatly bruised, hurt and wounded, and he became therefrom forever crippled and diseased, and was and will be sick, sore and disordered during the remainder of his life, during all of which time the plaintiff has suffered and will suffer great pain and has been and will be prevented from attending to and transacting his affairs and business; and by means of the premises the plaintiff was forced to and did lay out divers sums of money, and incurred divers large indebtedness, amounting to, to wit, (\$....) dollars, in and about endeavoring to be cured of his wounds, hurts and bruises as aforesaid, and has lost and will lose divers great gains and profits which he otherwise would have acquired. (To the damage, etc.)

1565 Loading and unloading cars, car shoved without warning, Narr. (Ill.)

For that whereas, prior to and on, to wit, the day of, 19.., the company was possessed of and operating large steel mills at in the county and state aforesaid, and there were then and there certain railroad tracks in and about said steel mills which, with the consent of the defendant, were customarily used to hold cars loaded with material for said steel company, and which were there unloaded by said steel company, through its servants in that behalf, and which said servants while unloading said cars were required to be on and about said cars and in such position as exposed them to great danger of bodily injury in the event of other cars being shoved against the cars they were unloading without timely warning to them; all of which facts the plaintiff alleges the defendant knew, or by the exercise of ordinary care in that behalf could have known.

And the plaintiff further alleges that defendant by virtue of an agreement or understanding between it and said steel company was accustomed to deliver cars to and haul cars away from said mills for said steel company and to switch cars in and about said tracks, and at the time and place aforesaid there was a certain car loaded with material for said steel company standing on one of said tracks for the purpose of being there unloaded by said steel company; that he was then and there employed by said steel company and in the discharge of his duty, and while he was exercising ordinary care and caution for his own safety, he was then and there upon said standing car engaged in unloading it for said steel company, and was in such a position upon said car that he was likely to be injured if the other cars were shoved against said car without warning to him; that the defendant without his knowledge was then and there about to shove certain other cars against said standing car; and that by reason of the premises it then and there became and was the duty of the defendant to exercise ordinary care toward learning if any one was engaged in unloading said standing car, and if so to warn such person that it was about to shove other cars against said car, and that if it had exercised such care it could have learned that he, the plaintiff, was so engaged in unloading said car and could have learned of his said position of danger; but that the defendant, not regarding its said duty, and in utter violation thereof, wrongfully and negligently failed and neglected to exercise ordinary care for the purpose aforesaid; and as a result thereof did not learn that plaintiff was engaged in unloading said car, or give him any warning that it was about to shift other cars against said standing car; and as a result thereof plaintiff, through no want of ordinary care on his part did not know or learn that said other cars were about to be shoved against said standing car which he was engaged in unloading; that defendant then and there negligently shoved said other cars violently against said car which plaintiff was so unloading as aforesaid without warning to him and he, by the compact or collision of said cars and the car which he was engaged in unloading as aforesaid, was thereby then and there thrown down upon the track there and the wheels and certain parts of said cars then and there passed over his left leg, thereby so crushing and mangling his said leg that it became necessary to amputate the same and it was amputated, and he thereby then and there sustained (Describe injuries, loss and damage in detail).

1566 Loading and unloading, supports removed, Narr. (Ill.)

For that whereas, on, to wit, the day of, 19.., at the county aforesaid the defendants were dealers in lumber and in said business necessarily employed workmen, laborers and servants; that R was then and there employed by

said defendants as a laborer and workman in a certain lumber yard of the defendants in the city of, to assist in unloading lumber from railroad cars; that on the day and year aforesaid, at the county aforesaid, the said R and, to wit, six other persons similarly employed, were engaged in the work of the said defendants, and the said R and said other persons were then and there all under the orders of one J, a foreman of the said defendants, and were all bound to obey the orders of said foreman in all the details of said work; that the said foreman then and there ordered the said R and certain of said persons, employees and servants of the said defendants, as aforesaid, to unload a certain car then and there loaded with lumber which said lumber was then and there held in place on said car by certain sticks, standards or stauncheons that had been and were placed there to assist in holding said lumber on said car; that he, the said R, then and there, in compliance with the said order of the said foreman, proceeded with all due care and diligence to assist in unloading said car, and while the said R was so doing, he, the said foreman, ordered the said R and certain other of said persons employees of the said defendant to take out, to wit, four of said sticks on one side of said car, leaving, to wit, two of said sticks still remaining on said one side of said car; that thereupon and after said four sticks had been so removed as aforesaid, he, the said foreman, then and there ordered R and certain other of said workmen and servants to move said car while he, the said R, was near the same and was working at unloading the same as aforesaid.

And the plaintiff avers that the said foreman carelessly and negligently by his order aforesaid first above mentioned caused too many of said sticks to be removed and carelessly and negligently by his said order secondly above mentioned caused said car to be moved as aforesaid while said lumber was not sufficiently held in place by a sufficient number of said sticks or standards; that by reason of the carelessness and negligence aforesaid of the said defendants by their said foreman, who was then and there and in that behalf acting as the agent of the said defendants, and without any fault or negligence of the said R, and by reason of the removal of said sticks and the moving of said car, the said lumber then and there fell off said car, and fell on the said R, and caused his death.

And the plaintiff further avers that the said R had then and there been employed in said business a short space of time, to wit, one hour, next prior to said injury, and was wholly without experience in the matter of unloading lumber, of which ignorance and inexperience of the said R the said defendants and the said foreman then and there had notice. And so the plaintiff says, that by the mere carelessness, negligence and improper conduct of the said defendants by their said foreman as aforesaid, and without any negligence or fault of the said R, he, the said R, was killed as aforesaid; that said injury

was not caused by any act or thing incident to the said R's employment as a servant of the defendant as aforesaid, nor by the negligence of any fellow-servant of the said R; that the said R left him surviving the plaintiff, his widow, and the following named children as his next of kin, to wit:
, and that by means of his death she has been deprived of her means of support, and the said children have been deprived of their means of support and education.
 (Proffer letters of administration)

Wherefore, etc.

1567 Loading and unloading, switch engine run into, Narr. (Ill.)

For that whereas, on, to wit, the day of, 19.., at, etc., the defendant, a corporation, etc., owned and possessed, and controlled a certain railroad, and a certain switch and side-track at said village of, and also a certain locomotive engine, and certain cars in and about the said railroad of said defendant and its said side-track and switch at said village of; that it has been, for a long time, and was, on said day of, 19.., (while still in possession and control of said railroad cars, side-track and switch at said,) the custom of said defendant by its agents, servants and employees, to place, and it did so, as aforesaid, at divers times, before, and on the day aforesaid, place loaded cars on its said side-track and switch; that it was then and there in the custom of allowing and directing, and did allow and direct (while still being in possession and control of said railroad cars and side-track), the person or persons whose freight or loads in and upon said cars (so placed on side-track as aforesaid), were, or to whom said freight or loads belonged, to enter upon said side-track and said cars so placed, as aforesaid, and with their servants and employees, to then and there unload and draw away the freight or loads of said cars so placed, as aforesaid, on said track; that it is and for a long time past has been, and on, etc., to wit, said day of, 19.., was the custom of said defendant with its agents, servants and employees in charge of a certain locomotive engine and cars belonging to or under the control of said defendant, to discharge, switch, or place loaded cars on said side-track and switch from the main track of said defendant, at said, and also in the same manner to remove unloaded empty cars from said track and switch on to the main tracks aforesaid; and at such time when the said work of switching or placing said loaded cars on said side-track or switch, and removing said unloaded or empty cars from said side-track or switch as aforesaid, was completed, with its said servants, agents and employees, to withdraw or remove said locomotive engine from

said side-track or switch to the main track aforesaid; and thereupon, to permit and allow the owner of freight on said loaded cars by his or their agents, servants or employees to enter upon said loaded cars and said side-track and remove such freight as aforesaid.

And, plaintiff avers that, on, etc., to wit, the said day of, 19.., the said defendant, by its said servants, agents and employees did so as aforesaid, switch or place loaded cars on said switch or side-track and remove unloaded or empty cars therefrom, and by its said servants, agents and employees, did remove said locomotive engine from said side-track.

And plaintiff avers that thereupon the said, in his life time, on, etc., to wit, said day of , 19.., with the knowledge, approval and consent of said defendant, and having been first given to understand by the said servants, agents, and employees of said defendant, that said locomotive engine and said cars would not again be run on said switch or side-track on that day, went and entered upon a certain loaded car then standing upon said switch or side-track aforesaid to unload the freight then upon said car, with all due care and caution; and while exercising due care on his part, and being the agent and servant of the owner of said freight, commenced unloading said car; and while so employed and while exercising due care on his part, the said defendant, by its said agents, servants and employees aforesaid, having the management and control of said locomotive engine and cars, and while working in the line of their employment as such servants, agents and employees, wrongfully and negligently, and without any warning or signal, and without ringing any bell or sounding any whistle on said locomotive engine, drove the said locomotive engine upon and against the cars which were at that time on the same side track with the car in which the said, deceased, was in his life time, so as aforesaid employed, and thereby drove said cars upon and against the said car upon which said was employed as aforesaid, with great force, speed and violence, and then and there and thereby the said was precipitated and fell between and in under the cars so as aforesaid, standing upon the side-track of the said defendant, said cars running upon and over said, and said was then and there and thereby greatly bruised, mangled and hurt, by reason of which said injuries the said, did, on, etc., to wit, said day of , etc., at said village of, die.

And the plaintiff avers that the railroad of the defendant so causing the death of said aforesaid was used in the said county of (Add last two paragraphs of Section 1495).

1568 Loose rail, Narr. (W. Va.)

For this, to wit, that heretofore, to wit, on the day of, 19.., in the county and state aforesaid, the said defendant was lawfully possessed or was the owner of a certain large car manufacturing plant and property, being so possessed thereof as aforesaid, and was then and there engaged in making, manufacturing, constructing and erecting and putting together railroad cars upon the aforesaid property, and in the use and manufacturing, constructing and erecting the aforesaid railroad cars at said plant as aforesaid, and in connection with the aforesaid manufacturing of said railroad cars, said defendant used a certain lot of railroad tracks and switches in operating the aforesaid car manufacturing plant, and said defendant handled a large lot of lumber and a large lot of iron of various and divers dimensions in the operation and construction of manufacturing the aforesaid railroad cars and in moving the aforesaid iron and lumber as aforesaid to the various parts of their plant, they used the aforesaid railroad tracks and railroad switches and operated cars of divers dimensions upon the aforesaid railroad tracks or railroad switches or side tracks as aforesaid; and it then and there became and was the duty of said defendant to see that the aforesaid railroad tracks and railroad switches and side tracks, were properly constructed and properly fastened down and made safe and secure in every respect and that the railroad cars of various dimensions as aforesaid, were safe and secure in every respect, to be used by the plaintiff and other employees of said defendant; and it became the duty of said defendant to use due and proper care and caution that said plaintiff and all other employees should be provided with good, proper, safe and suitable machinery and appliances to be used by plaintiff and other employees in said employment as aforesaid, and that the said plaintiff should be secure and safe in all respects in his employment for said defendant and all other employees should be safe and secure in their said work for said defendant, from any injury incident thereto, against which ordinary care and skill could have availed, while engaged for defendant in said work; but, said defendant wholly disregarded and neglected its duty in that behalf, and did not use proper care and caution that said plaintiff and other employees should be provided with good, proper, safe and suitable machinery and appliances to be used by said plaintiff in his said employment as aforesaid, and that the said plaintiff should be secure and safe in all respects in his employment, in which ordinary care and skill could have availed while said plaintiff was engaged for said defendant in said work from any injury incident thereto; and on the contrary, said defendant then and there provided for and suffered to be used by said plaintiff in and while said plaintiff was engaged in the work of manufacturing, construct-

ing, erecting and building railroad cars for said defendant, as aforesaid, a certain insecure and unsafe and unsuitable switch or railroad track with the rails placed upon said railroad track in an insecure and unsafe condition, in this, to wit, they were not nailed to the ties, and the ties used were unsafe and insecure ties and the said plaintiff was directed by one of the defendant's officers or agents then in charge of said defendant's plant, to push a certain railroad car or truck, used in moving the aforesaid lumber and iron as aforesaid over one of the aforesaid railroad tracks or switches, owned, used and operated by said defendant in constructing, erecting and manufacturing said railroad cars as aforesaid for handling material, and while said plaintiff was unaware that it was unsafe and in an insecure condition; that he was careful and cautious in pushing said railroad car as aforesaid as directed by said defendant's officer or agent then and there in charge so to do; and that he had no knowledge or information that the aforesaid railroad track was in an unsafe and insecure condition, or was loose and unnailed or in improper shape or was unsuitable to be used for the work which said plaintiff was directed to use it for by said defendant's officer or agent as aforesaid.

And plaintiff further alleges and charges that the aforesaid railroad track was in an unsafe and insecure condition and when said car or truck run over the aforesaid track, then and there owned and operated by said defendant, said rail being loose, flew up and hit said plaintiff between the legs, with great force and violence, with such great force, that said plaintiff was ruptured by reason of the lick received from said rail as aforesaid, and was greatly injured, and said plaintiff was hurt internally and other members of his body were broken, bruised, mashed and crushed and said plaintiff was greatly bruised, mashed and hurt and injured by means of the premises as aforesaid; that said plaintiff became and was sick, sore and lame and disabled and remained so for a long space of time and will continue to remain during all of his natural life and is permanently crippled and still is injured and will remain a cripple during the remainder of his natural life, unable to work or perform labor; that said plaintiff suffered great pain and great mental anguish and was and has been prevented from transacting and attending to his lawful and necessary affairs and business, and was deprived of great gains, profits and advantages of which he might otherwise and would have derived and acquired had it not been for defendant's carelessness; that said plaintiff has spent large sums of money, to wit, dollars to effect a cure of the aforesaid injury received at the hands of the defendant; that said plaintiff will have to expend large sums of money in the future for treatment; and plaintiff

says that he has been damaged in the sum of dollars. He therefore brings this suit.¹⁸⁵

1569 Man-hole frame on pavement, Narr. (Md.)

For that the plaintiff on or about the day of
, 19.., while working along the side
 of, a public highway in the city of
 stumbled and fell over a large iron man-hole frame lying on
 the pavement of said side of,
 the existence and location of which this plaintiff was unaware,
 and thereby received injuries, dangerous and permanent, on
 and about her right leg between the knee and foot, her head
 was badly bruised, her system generally shocked, and she was
 caused to suffer excruciating pain and great mental anguish;
 that she was thereby and has been since, caused to be confined
 to her room and has been prevented from attending to her
 household avocations, as well as that of seamstress; that she
 has been put to great expense for medical attention and medicine;
 and that other great and permanent wrongs and injuries
 have been thereby sustained by her.

That the said plaintiff, at the time of the happening of the
 acts aforesaid, was exercising due care and caution on her part
 but that the said injuries were occasioned by the negligence,
 default and want of care on the part of the defendants, their
 officers, agents and employees, in placing said iron man-hole
 frame upon the pavement aforesaid and in permitting the same
 to remain there for a long space of time, and in failing to provide
 any light or signal of any kind whatsoever, marking said
 iron man-hole frame or warning pedestrians of the location of
 the same. And the plaintiff claims, etc.

1570 Manufactured articles, action

A manufacturer is liable for injuries which result to third
 persons by placing upon the market for sale of a highly dangerous
 article, without notifying the public by proper label, or
 otherwise, of its dangerous character.¹⁸⁶

MINE INJURIES

1571 Mining act, nature and scope

The owners, operators, and managers of coal mines are liable
 under the Illinois Mining act for personal injuries resulting
 from all dangerous conditions in coal mines which endanger

¹⁸⁵ Denny v. American Car & Foundry Co., 69 W. Va. 405 (1911). Mich. 293, 295 (1907); Clement v. Crosby & Co., 157 Mich. 643 (1909).

¹⁸⁶ Clement v. Crosby & Co., 143

life, limb or health of the persons working in them, notwithstanding the failure of the mine examiner to properly mark or indicate the particular dangerous condition in his record, or to report the same to the mine manager.¹⁸⁷ This liability extends to a person who is injured as a result of a conscious or wilful failure to perform the statutory duty to have the mine examined and to have the dangerous places designated by statutory marks. If the mine is in a dangerous condition the examination and the marking of the mine are peremptory and must be made regardless of the mine owner's or operator's opinion of whether the examination is or is not necessary.¹⁸⁸ The mere failure to exercise ordinary care, or mere negligence, creates no liability on the part of the operator of the mine under the statute. The violation of the statute must be conscious or wilful.¹⁸⁹ The mere failure of the mine inspector to go through the useless operation of re-marking or re-tracking of his old marks of the dangerous places in the mine, is no violation of the statute, when the marks of danger which had been previously placed are plainly visible at the time of a re-visit to the mine.¹⁹⁰ Since 1911, a mine examiner's duty to make examinations is limited to the underground working of the mine.

In Illinois, the mine owner or operator is liable for personal injuries resulting from a wilful failure of the mine manager or mine examiner to perform any duty required by the Mining act, the mine manager and mine examiner not being considered fellow-servants of a miner.¹⁹² In West Virginia the mine operator or agent is regarded as having fully discharged his statutory duties by employing a competent mine boss and as being exempt from liability for any injury resulting to a miner from the failure of the mine boss to observe statutory requirements imposed upon him.¹⁹³

An action for personal injuries brought under the Mining act is not penal in its nature.¹⁹⁴

¹⁸⁷ *Mertens v. Southern Coal & Mining Co.*, 235 Ill. 540, 544, 545 (1908).

¹⁸⁸ *Aetitus v. Spring Valley Coal Co.*, 246 Ill. 32, 38 (1910).

¹⁸⁹ *Cook v. Big Muddy-Carterville Mining Co.*, 249 Ill. 41, 51 (1911).

¹⁹⁰ *Kilduff v. Consolidated Coal Co.*, 255 Ill. 617, 620 (1912).

¹⁹¹ *Rogers v. St. Louis-Carterville Coal Co.*, 254 Ill. 104, 108 (1912); *Laws 1911*, p. 388 (Ill.).

¹⁹² *Henrietta Coal Co. v. Martin*, 221 Ill. 460, 466 (1906).

¹⁹³ *Williams v. Thacker Coal & Coke Co.*, 44 W. Va. 599, 605 (1898).

¹⁹⁴ *Davis v. Illinois Collieries Co.*, 232 Ill. 284, 291 (1908).

1572 Parties

All persons who are employed in the mine, such as engineers, firemen, pumpmen, shot-firers, drivers, and other workmen and employees are within the protection of the daily inspection provision of the Mining act.¹⁹⁵ In mines in which coal is blasted with more than two pounds of powder for any one blast, and in mines in which gas is generated in dangerous quantities, a shot-firer is charged with the duty of determining for himself whether the shot is prepared in a practical and workmanlike manner, and his judgment is conclusive upon this question.¹⁹⁶ But whether a person injured in a mine was or was not a shot-firer is a question of fact, in the absence of clear proof to the contrary. A miner's certificate of competency is merely evidence that the holder possesses the qualifications to do the work of miners, and does not show that he possesses the practical experience required of a shot-firer.¹⁹⁷

A wilful failure, refusal, or neglect to comply with the provisions of the Shot-fires act of 1907 resulting in a fatal injury, gives no right of action to the widow of the person thus injured.¹⁹⁸ Persons who are not exposed to any dangers or perils peculiar to the mining trade or business, as those who are engaged in erecting and repairing buildings and repairing cars for a mining company, are not operative coal miners within the meaning of the Mining act, and are not entitled to its protection.¹⁹⁹ An action under the Mining act may be instituted by the widow, if there is one, by the lineal heirs or adopted children, if there is no widow, or by any person who was dependent for support upon the person that was killed, if there is neither widow, lineal heirs nor adopted children.²⁰⁰

1573 Declaration requisites

A count upon section 21 of the Illinois Mining act must aver that no place of refuge of the required size was cut in the side

¹⁹⁵ *Brennen v. Chicago & Carterville Coal Co.*, 241 Ill. 610, 619 (1909); *Hougland v. Avery Coal & Mining Co.*, 246 Ill. 609, 614 (1910).

¹⁹⁶ *Kulvie v. Bunsen Coal Co.*, 253 Ill. 386, 388 (1912); *Shot-firer's act* of 1905 as amended in 1907 (*Hurd's Stat.* p. 1564).

¹⁹⁷ *Kulvie v. Bunsen Coal Co.*, 253 Ill. 388, 390; *Act of 1908 as amended*

in 1909 (*Hurd's Stat.* 1911, p. 1566).

¹⁹⁸ *Hollingsworth v. Chicago & Carterville Coal Co.*, 243 Ill. 98, 106 (1909).

¹⁹⁹ *Rogers v. St. Louis-Carterville Coal Co.*, 254 Ill. 108, 110.

²⁰⁰ *Cook v. Big Muddy-Carterville Mining Co.*, *supra*.

of the wall of the mine at the working place where the miners were obliged to be or to pass to and from their work while in the performance of their duties.²⁰¹ A count which is based upon section 33 of the Mining act must allege wilful injury on the part of the defendant, but it need not state that the plaintiff had exercised due care or that he was not guilty of contributory negligence.²⁰²

1574 Collision, Narr. (Ill.)

For that whereas the defendant, a corporation of the state of Illinois, on, to wit, the day of, 19..., was, and for several years prior thereto had been, engaged in the business of mining and shipping coal at, to wit, at the county of, aforesaid, and being so engaged then and there had in its employ for carrying on of said business divers persons, including the plaintiff.

And the plaintiff avers that it was the duty of said defendant to prescribe and have proper rules and regulations for the conduct of its said business, and to properly make the same known to its said employees, clerks, foremen, superintendent and others in its employ, and to properly enjoin and enforce the observance of such rules and regulations for the reasonable and proper protection of the plaintiff from injury whilst engaged in said employment.

Yet, the said defendant, on, to wit, the day of, 19..., and before said date, at, to wit, the county aforesaid, not regarding its duty, neglected and failed to provide such proper rules or regulations or to properly make the same known to its said employees, clerks, foremen or superintendent, or to properly enjoin or enforce upon its said employees the observance of such rules or regulations, whereby and by reason of such neglect the plaintiff, on, to wit, the day and year and at the county aforesaid, whilst with due care engaged in the work of defendant loading with coal a certain car which had been placed and was standing on a certain track at a point alongside of a certain chute, certain other employees, not fellow-servants with the plaintiff, but engaged in the work of the defendant, switching cars, allowed a certain car or cars to collide with and jam against the said car which the plaintiff was helping to load as aforesaid, thereby forcing said last mentioned car against the plaintiff and crowding and crushing him against a certain platform and thereby then and there seriously and permanently injuring him as is hereinafter alleged.

²⁰¹ Cook v. Big Muddy-Carterville Mining Co., 249 Ill. 48; Sec. 21, Mining act.

²⁰² Bradley v. Chicago-Virden Coal Co., 231 Ill. 622, 627 (1908).

2. For that whereas, also, the plaintiff and the defendant being engaged as in the first count set forth, it was the duty of the defendant to provide and employ such number of persons as were reasonably necessary to do the work of loading coal and switching cars with reasonable safety against accident and against injury to the plaintiff.

Yet, the said defendant, on, to wit, the day of, 19.., at, to wit, at the county aforesaid, neglected its said duty in that regard and thereby the plaintiff, who, with due care on his part was then and there helping to load a certain car which was standing on the track at a point opposite to a certain coal chute, was unable to warn certain other of defendant's employees who were then and there switching cars for said defendant, but who were not plaintiff's fellow-servants, that he, the said plaintiff, was thus helping to load said car and was notwithstanding the use of reasonable care on his part in a dangerous position so that if said car should be moved whilst the plaintiff was so engaged and thus situated he might be killed or seriously injured, and by reason also of such neglect the said defendant's employees, who were then and there switching cars as aforesaid, could not by the use of reasonable care discover that the plaintiff was in a position to be seriously hurt if other cars should collide with said car, whereby and by means of which said neglect the plaintiff, who was thus with due care helping to load said car and therefore in a dangerous position was seriously and permanently injured by another car or cars then and there being switched as aforesaid coming against said car so being loaded and forcing said car last mentioned against the plaintiff and crowding and crushing him against a certain platform, and thereby then and there seriously and permanently injuring him as is hereinafter alleged.

3. For that whereas, also, the defendant being engaged as in the said first count set forth, and the plaintiff being in the employ of said defendant as a laborer, it was the duty of said defendant, by its agents and foremen, to use reasonable care when setting the plaintiff to work not to unnecessarily expose him to damage or injury.

Yet, the said defendant, on, to wit, the day of, 19.., at, to wit, at the county aforesaid, neglected said duty, and a certain foreman of said defendant, to wit, one, who was not a fellow-servant of the plaintiff, negligently and carelessly ordered and directed the plaintiff to tend the shutter of a certain coal chute through which coal was then and there being or about to be run into a certain car, which was then and there standing on a certain track at a point opposite to said chute; that the said foreman then and there knew, or by the use of reasonable care would have known, that certain other cars on said tracks were being switched or were about to be switched and that unless

the employees of said company who were doing or about to do said switching were informed that the plaintiff was thus engaged tending such shutter said switchmen would or might run said cars upon and against the car which the plaintiff was thus helping to load as aforesaid, and thereby injure the plaintiff. That said plaintiff properly and with due care obeyed said order and whilst he was with due care attending said chute the said switchmen, who were not fellow-servants of the plaintiff, switched a certain car or cars upon said track on which the car being loaded as aforesaid stood, and said cars so switched ran with great force against the said car so being loaded and thereby forced and jammed the car last aforesaid upon and against the plaintiff and then and there crowded him against a certain platform or structure with such force and violence as to then and there seriously and permanently injure him, to wit: breaking his left collar bone, depressing his chest and lungs, and forcing his eyes from their sockets and impairing and destroying his eyesight, and doing to him other injuries, whereby and by reason whereof the plaintiff was caused to suffer and still suffers great pain and distress of body and mind, and whereby he has been and still is disabled, sick, sore, lame and disordered and is prevented from pursuing his usual business and earning and receiving his usual income as a laborer, and whereby he has been put to the expense of, to wit, dollars in employing physicians and purchasing medicines to be cured of said injuries, and whereby it will be necessary to continue such expense hereafter, to the damage, etc.

1575 Coupling cars, Narr. (W. Va.)

For this, that heretofore, to wit, on the day of, 19.., and for sometime previous thereto, the said defendant was the owner and operator of a certain coal mine in the county aforesaid, and that the same was opened, operated and mined by means of a main drift or entry running into the said mine, with side entries or drifts leading therefrom, and that in said main drift or entry was a railway over which loaded and empty cars were hauled and driven into and through the said mine, and in said railway at a distance of feet from the main entry of said mine there was a parting, that is to say, the railway track running along said main entry as aforesaid was converted by means of switches into two tracks, on one of which the cars used by the said defendant in operating its mine were placed when the same were empty; and on the other of which tracks the cars used by the said defendant as aforesaid were placed when the same were loaded, which parting extended for a distance of feet along said main entry where it was converted by means of switches into one track which track continued along said main entry; that on

the day and year aforesaid, the plaintiff at the special instance and request of the said defendant became and was engaged in the employment of the said defendant in its said mine, and that as part of his duties in said employment he was required to couple and uncouple the cars used by the said defendant in its mine as aforesaid; and the said plaintiff says that on the day and year aforesaid he was a mere lad, a boy of tender years, just past thirteen years of age, and not yet fourteen years old, inexperienced in the operation and dangers of the employment in which he was engaged by the said defendant, and wholly and entirely incapable of comprehending and understanding the dangers and hazards incident to his said employment; and the plaintiff says that no caution or warning whatsoever was given to him as to how said work should be performed with reasonable safety to life and limb.

The plaintiff avers that the said employment was very dangerous and was accompanied with great risks and hazards beyond the comprehension of this plaintiff by reason of his youth and inexperience, even though he had been fully instructed, cautioned and warned as to the dangers incident to his said employment; that the said defendant, well knowing his age, inexperience and incapacity to comprehend and appreciate the dangers incident to his employment, and well knowing that he could not comprehend and appreciate any instructions given to him in regard thereto, even if such instructions had been given, on the day and year aforesaid, while he was at his post of duty, taking the coupling from the cars used by the said defendant in its mine as aforesaid, for the purpose of handling and hauling the coal mined therefrom as aforesaid, wholly disregarded its duty to the said plaintiff and wrongfully, carelessly and negligently caused one of its said cars, which was being taken and removed from one point to another in said mine, and without notice or warning whatsoever to the said plaintiff, to be suddenly dashed with great force and violence against and upon the said plaintiff, and against and upon the cars from which the said plaintiff was so removing and coupling as aforesaid; and by reason thereof the said plaintiff was caught between the bumpers of the said cars, which were being so used by the said defendant as aforesaid, and was wounded, bruised and injured and thereby became sick, sore, lame and disabled in so much and to such an extent that it became necessary to amputate his right leg, and that the same was amputated. And he was confined to his bed for a long space of time, and thereby and in consequence thereof he suffered great pain of body and endured and suffered great mental anguish, and was unable to do any work for a long space of time, to wit, from the day of, 19.., thence hitherto.

The plaintiff says that the defendant wrongfully, negligently and unlawfully engaged and employed the plaintiff in the said

position in said mine, he being a boy of tender years, without experience in mining operation, and the plaintiff says that it became and was the duty of the defendant to have shown and instructed the plaintiff in the method of performing his duties incident to his employment, but on the contrary the plaintiff says that the said defendant wholly failed to discharge his duty in that respect, and that the said defendant did not exercise due and reasonable care in that behalf, but on the contrary negligently, carelessly and wrongfully permitted the plaintiff to shift for himself; to take all risks and dangers incident to his youth, incapacity and inexperience in the work which he was engaged to perform for the said defendant as aforesaid; and in the performance of which he sustained the injury of which he herein complains.

The plaintiff says that the said defendant failed and refused to discharge any of the said several duties aforesaid, which he owed to him, the plaintiff, but wrongfully and negligently failed and refused to do so, and thereby caused to him the injury aforesaid. And by reason thereof the said plaintiff has been permanently disabled, injured, lamed, disfigured and crippled and rendered unfit for the active pursuits and occupations of life.

Wherefore and by means of the premises and of the wrongs, grievances and injuries hereinbefore mentioned and set forth, the said plaintiff has sustained damages to the amount of dollars. And therefore he sues.²⁰³

1576 Dangerous condition, action

The operator of a mine is liable for any injury sustained in a mine from a live wire, for the reason that the statute covers all dangerous conditions found in the mine whether permanent or temporary.²⁰⁴

1577 Dangerous condition, gob, Narr. (Ill.)

For that whereas, heretofore, on, to wit, the day of, 19.., the defendant was in possession of and operating a certain coal mine in said county of and state of Illinois, known as, that said coal mine was then and there operated by means of a perpendicular shaft, and certain roadways and entries were driven in said mine off of which certain rooms were turned and coal drawn from said rooms to the bottom of said perpendicular shaft by mules hitched to certain cars; that in said mine certain men were employed to dig coal and others to drive the

²⁰³ Ewing v. Lanark Fuel Co., 65 Coal Co., 239 Ill. 457, 458, 459 W. Va., 726 (1909).

²⁰⁴ Dunham v. Black Diamond

mules in hauling coal from said rooms to the bottom of said perpendicular shaft, all of whom were then and there in the employ and under the direction of said defendant; that on said date plaintiff was then and there employed in said mine as a mule driver; and that in and about the course of his employment it then and there became and was necessary for him to be on a certain car drawn by a certain mule in the entry off of the main west entry between rooms numbers and

Plaintiff further avers that there was then and there in full force and effect the following provision of statute law: (Set out statute).

That under said law it then and there became and was the duty of the defendant to cause its mine inspector to visit said mine before the men were permitted to enter it and to observe whether there were any recent falls or obstructions in rooms or roadways or accumulation of gas or other unsafe conditions, and to examine said entry between rooms and for said purpose and to make a daily record of the condition of the mine as he found it, between said rooms and and other places in a book kept for that purpose, and to allow no person to remain in said mine nor to enter therein to work, except under the direction of the mine manager until all conditions had been made safe.

That the defendant disregarding its duty, as aforesaid, wilfully and knowingly permitted the plaintiff to enter said mine to work therein without being under the direction of the mine manager on said date, and to be and about said entry between rooms and, well knowing that there then and there existed in said mine between said rooms and in said entry a dangerous condition caused by allowing a large amount of rock and debris, commonly called gob, to accumulate and be along said roadway between said points, which said rock and debris at said time and for a long time prior thereto formed an obstruction to said roadway, and extended from the rail of said roadway along the side of said track to a great height, to wit, feet and extended so near to said track that some of said gob would catch upon cars passing on said roadway, which said rock and debris so piled along the side of said roadway then and there formed a dangerous condition in said mine at said point.

2. And plaintiff further avers that it then and there became and was the duty of the defendant to furnish the plaintiff with a reasonably safe mule with which to do said work.

But disregarding said duty said defendant carelessly and negligently failed to use reasonable care to furnish the plaintiff with a reasonably safe mule with which to do his work and then and there carelessly and negligently furnished plaintiff with a dangerous and unsafe mule, which mule was unsafe because of its well known habit of balking, which was

extremely dangerous in said mine on account of the track being on a slight incline. That the defendant then and there knew of the disposition of said mule to balk, or by the exercise of ordinary care might well have known it, and that the plaintiff had no knowledge of the disposition of said mule.

3. Plaintiff further avers that it was then and there the duty of the defendant to use reasonable care to provide for the plaintiff a reasonably safe place to work; but that the defendant disregarding its said duty carelessly and negligently failed to use reasonable care to furnish the plaintiff a reasonably safe place to work, in this, that in said entry off of the main west entry in said mine, between rooms and, the defendant negligently and carelessly permitted a large amount of loose rock, slate and dirt commonly called gob to accumulate along the side of said track so close to said track that it then and there impeded the passage of said car along said track and caught upon the sides of the same, and by reason thereof then and there formed a dangerous condition at said point.

By means whereof, on the day of, 19.., while plaintiff was then and there in the usual course of his employment in hauling coal along said roadway, and while riding on the front end of a car, said roadway at said point being on a slight incline, and while exercising due care and caution for his own safety, the said gob which was then there piled along said roadway at said point as aforesaid and which had then and there carelessly and negligently been permitted to remain along said driveway, and in close proximity thereto, caught upon the side of the car on which the plaintiff was then and there riding and caused the mule which the plaintiff was then and there driving to become unmanageable and said mule did throw the plaintiff off of said car between the rib of said entry and said car, whereby he was greatly bruised and mashed in various parts of his body, and he was injured internally; that said injury so occasioned is permanent; that in consequence of said injury the plaintiff became sick, sore, lame and disordered and so remained for a long time, to wit, from thence hitherto, during all of which time he suffered great pain in body and mind and was hindered, and prevented from transacting his ordinary affairs, and was compelled to pay out and become liable to pay out a large sum of money, to wit, dollars in and about endeavoring to be healed of said wounds and sickness. Wherefore, etc.

1578 Dangerous condition, live wire, Narr. (Ill.)

For that whereas, heretofore, on, to wit, the day of, 19.., in the county and state aforesaid, the defendant was then and there a corporation engaged in the business of mining coal, and was then and there operating a certain coal

mine with a certain shaft, entries, rooms and certain roadways and had then and there certain electric wires for the conveying of electric power through said mine, and along the entries thereof, in and along and through which certain employees were engaged and employed in and about the work of driving certain mules then and there hitched to certain coal cars; and at the time and place aforesaid, the plaintiff avers that he was then and there employed by the defendant in the capacity of a driver of a certain mule then and there hitched to a certain coal car, in a certain entry in said mine at a point where one of said wires was then and there located along the walls of said entry, at a point where the same was easily touched by the said mule.

And the plaintiff avers that the aforesaid wire at the time and place aforesaid was then and there charged with electricity and was then and there left without any insulation or other protection to prevent a shock to any person or mule coming in contact therewith, and that there was then and there in close proximity to the track then and there located in said entry, and upon which certain coal cars were then and there being drawn by said mule a certain post, and that the said charged wire, in an unprotected condition, in close proximity to the track aforesaid and the post near the same then and there constituted a dangerous condition in said mine.

And the plaintiff avers that the defendant had then and there wilfully failed and wilfully neglected to comply with the statute of the state of Illinois, in this, that the mine manager of said defendant did not visit all the various working places in said mine as often as practicable, and did not see that all the dangerous places above and below were properly marked, and that danger signals were displayed at the aforesaid place which was then and there in the entry of said mine, and which was then and there dangerous as aforesaid to the plaintiff while driving and controlling said mule.

2. And also it then and there was among other things provided by the statute of the state of Illinois as follows to wit: "No one shall be allowed to enter the mine to work therein, except under the direction of the mine manager, until all conditions shall have been made safe."

And the plaintiff avers that the defendant then and there wilfully failed and wilfully neglected to comply with the aforesaid provisions of the said statute by then and there allowing the plaintiff to enter its said mine to work in the capacity of a mule driver therein, and not under the direction of the mine manager, at a time when there was then and there in said mine and at the place where the plaintiff was required to work a certain dangerous condition, which had not then and there been made safe, to wit, a certain live wire charged with elec-

tricity, which was then and there on the walls of the entry in which the plaintiff was then and there at work driving and controlling a certain mule hitched to a certain coal car on the track in said entry, and which was then and there wilfully placed within the reach of the aforesaid mule and was then and there left without any insulation or other protection to prevent an electric shock to said mule when coming into contact therewith.

And the plaintiff avers that the defendant then and there knew or by the exercise of reasonable inspection would have known of the unprotected condition of said wire, and wilfully failed to exclude the plaintiff from said working place until said condition was made safe.

3. And the plaintiff avers that the defendant had then and there wilfully failed to comply with the statute of the state of Illinois therefor provided, in this, that it did not then and there have a mine examiner who made an examination of the mine and a record of its conditions in compliance with the statute aforesaid; that the mine examiner employed by the defendant did not visit said mine and inspect the same at all places where men were expected to pass or to work and observe whether there were any unsafe conditions; and he did not then and there place at the place aforesaid in the entry aforesaid, inscriptions on the wall with chalk, showing the day and month of his visit; and he did not then and there place a conspicuous mark at the aforesaid dangerous place, as notice for all men to keep out; and he did not at once report to the mine manager the dangerous condition and the presence at the aforesaid place of an electrically charged wire which was not then and there insulated or otherwise protected from the contact of mules in said entry, which condition had theretofore been discovered by him; and he did not then and there prevent the plaintiff and other employers from entering the said mine at the time aforesaid to work therein until all conditions were made safe, the plaintiff being then and there at work not under the direction of the mine manager; and the said mine examiner did not then and there make a daily record of the conditions of the mine as he found it, in a book kept for that purpose; and he did not make the said record before the said plaintiff was permitted to enter the said mine.

And the plaintiff avers that he was then and there at work as aforesaid, in a certain entry in said mine at the place of said unprotected and charged wire, in driving and controlling a certain mule then and there hitched to a certain coal car which was then being drawn by said mule along a certain track in said entry; and while he was so engaged the said mule then and there came in contact with the aforesaid wire, and then and there was frightened and caused to lunge and jump, and

thereby threw and pulled said car in such manner as to throw the plaintiff between said car and a certain pole then and there in close proximity to said track; and thereby then and there the plaintiff had his pelvis bone and divers other bones of his body broken and divers ligaments and nerves of his body strained and injured, his back lamed, his body and limbs crushed and mangled; and other injuries to his body and nerves he then and there sustained; and by reason thereof he has been permanently injured, and he has been obliged to lay out divers sums of money, to wit, dollars, in an endeavor to be healed and cured, and he has suffered great pain and distress and has been prevented from following his usual and accustomed work and has lost divers great sums of money because thereof.

To the damage, etc.

1579 Elevator, air-brake defective, Narr. (Va.)

For this, to wit, that before and at the time of the committing of the several grievances hereinafter next complained of, the said defendant was the owner of and was operating a certain mine, commonly called the "..... mines," in the said county of for the purpose of obtaining therefrom certain ore, commonly called "pyrites." That before and at the time of the committing of said grievances the said plaintiff's said intestate was an employee of the said defendant in the capacity of a common, or unskilled laborer in and about its said mining operations within said mine. That at the time of said employment of the said intestate by the said defendant, the latter undertook to carry, or transport him from the surface of the earth to and from whatsoever place within said mine it might be the duty of the said intestate to work, during the existence of such employment, by hoisting and lowering the latter within the shaft of said mine, which was not a vertical, but an inclined shaft, at an angle of thirty degrees from the vertical, and which was not cased up so as to prevent a person on board of one of the cars of the said defendant, as the said intestate was as hereinafter set forth, from being thrown from such car, as the said intestate was thrown and killed as hereinafter also set forth; and the machinery used for such last named purpose by the said defendant at the time of such employment was reasonably safe and suitable therefor, having regard to the character of said shaft, being such machinery as was in use at such mine at the time that said employment commenced.

That thereupon it became and was the duty of the said defendant, after said employment began, not to change such machinery, by substituting and using for so carrying, or transporting the said intestate, other machinery in its place not reasonably safe and suitable and not kept in a condition

reasonably safe and suitable for such purpose, without giving notice to the latter of any increased danger, or risk to his safety caused thereby, known to the said defendant, and unknown to the said intestate, which was not obvious, or visible to, and which the latter could not discover by the exercise of reasonable care and observation on his part.

Yet, the said defendant not regarding its duty in that behalf, after such employment, and a very short time before the death of said intestate, (which occurred as hereinafter set forth), to wit, about two weeks before such death, did, carelessly and negligently, change such machinery by substituting and using other machinery in its place not reasonably safe and suitable and not kept in a condition reasonably safe and suitable for said last named purpose, in this, to wit, that the said defendant installed and used for said transporting and carrying of the said defendant a new and different kind of hoisting machinery from that theretofore used by it, not reasonably safe and suitable and not kept in a condition reasonably safe and suitable for such purpose, in this, to wit, that, at the time of the injuries to said intestate which caused his death as hereinafter set forth, the means furnished by such new hoisting machinery used by the said defendant for stopping and holding the car, skip or bucket, (as the cars used by the said defendant for carrying, or transporting said intestate and other employees of the said defendant to and from their places of work in said mine are variously called), in the shaft of said mine, was to operate by compressed air the brake controlling the holding and lowering of such car, (which brake when so operated will be hereinafter referred to as "air-brake") which air-brake was unreliable because, as originally constructed and installed the air leaked therefrom, and after such new machinery was installed as aforesaid it was allowed by said defendant to become out of repair so that the air leaked therefrom and by reason thereof it was likely to fail in its control of such car and allow such car when it was attempted to be held hereby in any place in said shaft, to escape control; and such air-brake as originally constructed and installed, and as it continued to be was likely to stop such car with a sudden and violent jar, when attempt should be made to stop same when in motion going down said shaft; all of which defects and said results likely to be caused thereby as aforesaid, were, before and at the time of said injuries to said intestate, well known to the said defendant, or would have been so known to, or foreseen by it, by the exercise of reasonable care and forethought on its part for the safety of its employees including the said intestate; but were wholly unknown to the said intestate; were not obvious or visible to, and could not have been discovered by him by the exercise of reasonable care and observation on his part; and that the said old machinery, which such new machinery displaced as aforesaid, was fur-

nished with a similar brake operated by hand and foot power, which was not likely to fail in the control of said car, or allow it to escape control in any of the situations above mentioned; and was not likely to stop such car with a violent and sudden jar, when attempt should be made to stop same when in motion going down said shaft; but would, on the contrary, have operated in both of such situations, with reasonable certainty, without causing such results, all of which was, before and at the time of said injuries, well known to the said defendant.

2. And for this also that before and at the time of the committing of the several grievances hereinafter next complained of, the said defendant was the owner of and was operating a certain mine, commonly called the "..... mines," in the said county of, for the purpose of obtaining therefrom certain ore, commonly called "pyrites," which business was dangerous, complicated and carried on by a great number of employees—different employees having different duties to perform—and that especially were the duties of the employee, hereinafter designated as the "hoistman," and likewise the machinery he operated complicated and abnormally dangerous to the safety of the plaintiff's intestate and his co-employees, unless such duties were performed and such machinery was operated in a reasonably safe method.

That before and at the time of the committing of said grievances, the said plaintiff's said intestate was an employee of the said defendant in the capacity of a common, or unskilled laborer in and about its said mining operations within said mine.

That at the time of said employment of said intestate by the said defendant, the latter undertook to transport, or carry the said intestate from the surface of the earth to and from whatsoever place within the said mine it might be his duty to work during the existence of such employment, by means of hoisting machinery equipped with a brake, which might have been operated by hand, (which when so operated will be hereinafter referred to as "hand-brake"), by another employee of the said defendant who operated the said hoisting machinery for the said defendant, and who was commonly known and designated as a "hoistman;" that said machinery, if so operated, would have controlled and held the car hereinafter mentioned, from which the said intestate was thrown and killed as hereinafter set forth, and would have prevented the loss of control of such car and the sudden stopping of the same also hereinafter set forth, all of which was well known to the said defendant before and at the time of the said injuries to said intestate which caused said death: that said machinery was then and there equipped with the same brake aforesaid, which might have been operated by the said hoistman for the said defendant also by compressed air (which when so operated will be hereinafter referred to as "air-brake,") by turning

the full pressure of such air on such brake and continuing such air so turned on, to hold the car hereinafter mentioned, from which the said intestate was thrown and killed as hereinafter set forth; that, if so operated, it was unreliable because the air leaked therefrom and by reason thereof it was likely to lose control of said car, and not hold the same, but did usually control and hold, and would likely have controlled and held such car, in the situation in which the car was placed with said intestate on board of it as hereinafter set forth; that if said car was operated with said air not turned on and with such air continued so turned on to its full pressure, said machinery would not control or hold such car in such situation because of the leaking of the air from said air-brake, and if used to stop such car after control of it was lost, as it was used as hereinafter set forth, the air-brake was likely to cause a sudden and violent stop and jar of such car, such as that which threw the said intestate off therefrom and caused his death as likewise hereinafter set forth, but which, in such case, might have been so used as to stop such car without such sudden and violent jar, by the exercise of reasonable care and skill (which reasonable care and skill, however, under such circumstances, would have required exceedingly great care and skill on the part of such hoistman, and his being in fit condition physically and mentally, and possessed of presence of mind and having control of his nervous system), by said hoistman gradually and by degrees slowly turning said air upon said air-brake so as to gradually increase the air pressure thereon, while such car was running wild down said shaft, until such increasing pressure brought such car to an easy stop; all of which defects and said results likely to be caused thereby as aforesaid were, before and at the time of said injuries, well known to the said defendant, or would have been so known, or foreseen by it, by the exercise on its part of reasonable care and forethought for the safety of its employees, including the said intestate, but were wholly unknown, were not obvious, or visible to, and could not have been discovered by the said intestate by the exercise of reasonable care and observation on his part.*

That thereupon it became and was the duty of the said defendant to make and enforce some reasonable rule, or regulation, directing and requiring the hoistman operating the said hoisting machinery to use said hand-brake to control said car and to hold and stop the same in the situations aforesaid, and not the said air-brake.

Yet, the said defendant, not regarding its duty in that behalf, did not make, or enforce any rule, or regulation directing, or requiring such hoistman operating the said hoisting machinery to use said hand-brake to control said car and to hold and stop the same in such situations as those aforesaid and not the said air-brake; but wholly neglected so to do, and, on the contrary, at the time of said injuries to the said intestate directed,

or knowingly allowed such hoistman to neglect to use said hand-brake and to use and rely entirely upon said air-brake for such purposes.

3. (Consider second count to star as here repeated the same as if set out in words and figures.)

That thereupon it became and was the duty of the said defendant to use reasonable care and diligence to provide a fit person as hoistman to operate said hoisting machinery and brakes, that is to say a person who was not unfit because of lack of experience, or by reason of his physical or mental condition and one who was of a reasonably careful disposition and who was likely to have sufficient regard and consideration for the safety of his co-employees, including the plaintiff's intestate, to use said hand-brake, instead of air-brake, in the situation aforesaid, and one not likely to use said air-brake instead of sand hand-brake in such situation, thereby increasing the danger and risk to the safety of said intestate beyond that ordinary incident to the said transporting or carrying of him by the said defendant.

Yet, the said defendant, not regarding its duty in that behalf, did not use reasonable care and diligence to provide such fit person as hoistman, but wholly neglected so to do, and, on the contrary, on the . . . day of . . . , 19. . , at about . . . o'clock of the . . . noon of that day, in the county aforesaid, the said defendant provided an unfit person as hoistman to operate said hoisting machinery and brakes with reasonable care and skill in this, to wit, that such person so provided by the said defendant had not had sufficient experience wherewith to operate said air-brakes with reasonable care and skill as aforesaid, and independent of this he was a man of nervous and excitable temperament even when in good health and condition, and who was then and there, at the time and place last aforesaid, sick with pleurisy, and in a feverish and otherwise weak and debilitated condition, resulting from such sickness, and also from excessive use of intoxicating liquor, so that then and there his nervous system was not under control, and his mind was abnormally excitable and unreliable in its operation and was not of a reasonably careful disposition, but who was one who had for a long time before the said . . . day of . . . , 19. . , habitually shown a lack of regard and consideration for the safety of his co-employees, including the said intestate, by using said air-brake, instead of said hand-brake, in raising, lowering and holding said car in said shaft when loaded with such co-employees, and had during such time habitually neglected to use said hand-brake to hold such car when stopped in such shaft and to control or stop such car when descending such shaft when so loaded; that this disposition and conduct and unfit condition of such hoistman were well known to the said defendant at the time of such conduct or by the exercise

of reasonable care and diligence on its part would have been so known to it; but that notwithstanding this, the said defendant, instead of discharging said hoistman continued him in its employment.

And that accordingly, on the day of, at about o'clock in the noon of that day, in the county aforesaid the said defendant, with such hoistman, undertook to transport or carry the said intestate from the place within said mine where it was then and there his duty to work, to wit, from the level or excavation therein hundred feet below the surface, up said shaft to the surface of the earth; and to perform such undertaking, the said defendant, contrary to its said duty in that behalf as aforesaid, used said new machinery and operated said air-brake for such purpose, without then giving, or having at any time given any notice whatsoever to the said intestate of any increased danger or risk to his safety caused thereby and the said unfit hoistman so provided by the said defendant as aforesaid; that by reason of such unfitness, then and there said defendant did not operate said machinery and brakes with reasonable care and skill so as not to increase the danger and risk to the safety of the said intestate beyond that ordinarily incident to the said transporting or carrying of him by the said defendant, but, on the contrary, operated said air-brake, although the said defects of said air-brake and said results likely to be caused thereby as aforesaid, were, before and at such time well known to the said defendant, or would have been so known to, or foreseen by it, by the exercise by it of reasonable care and forethought as aforesaid; and were wholly unknown, were not obvious, or visible to and could not have been discovered by the said intestate by the exercise of reasonable care and observation on his part, as aforesaid; that after the said intestate had been and there boarded one of said cars, in the position in which it was, before and at such time customary for the said defendant to so transport, or carry the said intestate and other employees of the said defendant from said mine, and it was unknown to said intestate that such hoistman was operating, or would then operate such machinery, and after the said defendant had been notified that the said intestate and other employees of said defendant were on board of such car, ready to be transported or carried up said shaft to the surface of the earth, the said defendant negligently and carelessly used and relied, and allowed the said hoistman to, and the latter accordingly did use and rely, upon the said air-brake, instead of using and relying upon said hand-brake to hold such car where it then and there was in said shaft, loaded with said intestate and said other employees of said defendant, before starting such car up said shaft; that while the said defendant was then and there through the agency of such hoistman using and relying upon said air-brake, because of the leaking of the

said air-brake, it failed in its control of such car and such car escaped such control and ran down said shaft with great speed, with the said intestate and said other employees thereon as aforesaid, towards the bottom of said shaft, which bottom was then and there some feet below said surface of the earth; that thereupon the said defendant negligently and carelessly allowed the said hoistman to, and the latter accordingly did, undertake to stop said car by the use of said air-brake, by not turning said full air pressure on such brake and continuing same so turned on, but by turning same on and then turning off any further continuing supply of air thereto, and instead of with the said hand-brake, which caused a sudden and violent stop and jar of such car, when it had gone about feet down said shaft below where it had been held as aforesaid, (to wit, to about feet below said surface, and about feet above the bottom of said shaft), whereby the said defendant threw the said intestate from such car down said shaft, causing him to receive severe bodily injuries, whereof, upon said day of, 19., at the county aforesaid, the said intestate died; by reason whereof right and action accrued pursuant to the statute in such case provided, to the said plaintiff, who has since the death of the said intestate duly qualified as his administratrix.

1580 Explosion, Narr. (Ill.)

For that whereas, heretofore, to wit, on the day of, 19., in the city of, in the county of, in state of Illinois, the defendant was engaged in the business of operating a certain coal mine or shaft for the purpose of winning, mining and hoisting coal; that a part or portion of said mine was known as the room of the south, west passageway, or long wall, from which room the coal had been removed prior to the date of, 19., and in which room or entry the tracks, which had been used for the purpose of removing the coal from said room were yet remaining; that the mouth or entrance of this said room or entry was, on the date aforesaid, about feet in height, and at a distance of about feet from the said mouth or entrance of the said room, the roof was much higher; that in this higher chamber or dome of the said room or entry large quantities of poisonous, inflammable and explosive gases had accumulated prior to the said date, and had been allowed to remain in said room or entry, on and about the said date; and that in the said room the servants of the defendant, including the plaintiff, were required to be and to work in the course of their regular employment.

And the plaintiff being then and there employed by the

defendant in the said mine, it was the duty of the said plaintiff in the regular course of his employment to clean out and remove obstructions of dirt, slate, stone and other material which had accumulated on the tracks of the passageways of the said mine where the cars of said defendant were moved about; and it was also the duty of the plaintiff in the course of his employment to load this slate, dirt, stone and other material in a car furnished by the defendant to the plaintiff for the purpose and to take the same and unload it at and in some room or entry designated by the defendant, from which the coal had been previously removed; that upon the night of, 19.., the plaintiff was directed by the defendant, that he in company with another servant of the defendant take a certain large sized coal car belonging to the company, and brush the entries and passageways in the part of the mine and in the vicinity of the said room of the south, west passageway and load the dirt, slate, stone and other material so found in the said entries and passageways into the said car and deposit it in some room or entry adjoining the passageway known as the south west passageway or long wall; that this the said plaintiff and other servants of the defendant, proceeded, then and there, to do; and that they were compelled to unload the said dirt, slate and stone so loaded in the said car by them in the said room of the south, west passageway, by reason of its being the only room in that vicinity, the mouth of which was of sufficient height to admit the said car.

And the plaintiff avers that it then and there became and was the duty of the defendant to use reasonable care to keep and maintain the said passageways, rooms, and entries in a reasonably safe condition for the use of the said employees, aforesaid; but that the defendant, not regarding its duty in that respect or behalf, negligently and carelessly suffered and permitted large quantities of inflammable gas (sic) to accumulate and remain in certain of the passageways, entries, and rooms wherein it was the custom, duty and business of the employees of the mine to be and work; of which gas (sic) the plaintiff was wholly unaware, and the presence of which gas the defendant did then know, or by the exercise of reasonable care ought to have known.

2. And plaintiff further avers that it then and there also became and was the duty of said defendant to use reasonable care to keep said passageways, rooms, and entries where its employees were directed and required to work reasonably free from the accumulation of explosive or inflammatory gas (sic); but wholly neglecting its duty in this behalf, said defendant, as aforesaid, had then and there allowed a large quantity of gas (sic) to accumulate in said entry or room at the point

where the plaintiff was unloading the said dirt, stone, slate, and other material, of the presence of which gas (sic) the plaintiff was wholly unaware and the risk of which he did not assume, and concerning the presence of the said gas (sic) the defendant did know, or by the exercise of reasonable care ought to have known.

3. And that it then and there also became and was the duty of the defendant to use reasonable care to keep the mine, and the rooms, entries, and passageways therein reasonably free from all inflammable, noxious and explosive gases, and supplied with a sufficient quantity of fresh, pure and wholesome air, and to keep closed and sealed all rooms and entries wherein there was not a quantity of pure, fresh and wholesome air, sufficient for the health and safety of all men and animals employed in the said mine and to use reasonable care to keep the roof of the rooms, entries, and passageways reasonably free from the accumulations of noxious, inflammable and explosive gases wherein the men were required to be and work in the course of their employment by the defendant; but the said defendant disregarding its duty in this behalf, carelessly and negligently failed to provide or have sufficient quantities of fresh, pure and wholesome air in certain entries and rooms, where the plaintiff, in the due course of his employment was required to work, and be, to wit, the first room of the south, west passageway or long wall, but the current passed along the adjoining passageway and did not enter in the room or entry aforesaid, wherefore large quantities of inflammable and explosive gases accumulated by reason of the absence of sufficient quantities of fresh air, as aforesaid, and had negligently been permitted to remain in the said room or entry where the plaintiff was required in the course of his employment to be and work, the presence of which gas (sic) was then and there known to the defendant, or by the exercise of reasonable care might have been known by the defendant, but was unknown to the plaintiff and the risks arising therefrom he did not assume.

4. And it then and there also became and was the duty of the defendant to maintain currents of fresh air, on the date aforesaid, in the said mine and the rooms, entries and passageways therein, sufficient for the health and safety of all the men and animals employed therein, and it was the duty of the defendant to force said currents of air through every working place throughout the mine, so that all parts of the said mine should be reasonably free from deleterious air, as by the statute of the state of Illinois in such case made and provided, namely, section, chapter 93, Hurd's Revised Statute; that there was in the said mine, then and there a part known as the room of the south,

..... west passageway, from which said room or entry the coal had been previously removed, and in which said room or entry the tracks which had been used for the purpose of running coal cars thereon at the time the said coal was being removed and hauled out of said room were yet remaining on the said date of, 19.., that it became and was necessary for the employees of the defendant company to be and work in and about the said room of the south, west, passageway in the regular course of their employment; that it then and there became the duty of the said defendant to maintain currents of fresh air sufficient in the said room of the south, west, passageway for the health and safety of all the servants of the said defendant, who were required to be, and work in, and about the said room of the south, west passageway in the due course of their employment, so that all the parts of the said room of the south, west passageway should be reasonably free from the deleterious air of every kind; but the said defendant wilfully disregarding its duty in this behalf did not maintain in and about that part of the said mine and in the said room or entry, known as the room of the south, west passageway currents of fresh air sufficient for the health and safety of all the men employed and about the said part of the said mine; and the said defendant did not on the date aforesaid, then and there, force the said currents of fresh air into that part of the said mine, known as the room of the south, west passageway, so that the air in the said room was reasonably free from deleterious air of every kind on the said date of, 19.., but wholly neglecting its duty in this behalf defendant did then and there permit the air currents to pass along the adjoining passageway or entry in front of the said room, wherefore large quantities of inflammable and explosive gases had accumulated, by reason of the absence of sufficient air, as aforesaid, in the said room of the south, west, passageway, large quantities of gas then and there accumulated in the said room and had been permitted to remain therein.

5. And that it then and there also became and was the duty of the defendant, by reason of the statute in such case made and provided, namely, section, chapter 93, Hurd's Statute 19.., to employ a mine examiner to visit the mine each morning before the men were permitted to enter it and to inspect the said mine, including the said room or entry of the south, west passageway, or long wall and the parts adjacent thereto, and to observe whether there were any recent falls or obstructions in said room or entry, or roadways adjacent thereto, or accumulations

of gas or other unsafe conditions, as above set forth, in said portion of the mine; and as evidence of his examination of the said place, to inscribe on the wall thereof the month and day of the month of his visit; and when the accumulation of gas was discovered in the said room or entry, it was the duty of the said mine examiner to place a conspicuous mark thereat, as notice for all men to keep out, and at once to report his finding to the mine manager; and it was the further duty of the defendant to permit no one to enter the mine to work therein, except under the direction of the mine manager, and until all conditions were made safe; but the said defendant wilfully disregarding its said duty in this behalf, did not have a mine examiner who visited the mine, and all the parts thereof where the servants of the defendant were expected to pass and work each morning before the employees, including the plaintiff, were permitted to enter it, and who visited the said portion of the mine, known as the room or entry of the south west passageway or long wall, before the employees of the defendant were permitted to enter it, and who did on the said dates inspect that portion of the mine, known as the room of the south, west passageway or long wall, and the part of the mine adjacent thereto, and as evidence of his visit, inscribe on the wall of the said room of the south, west passageway or long wall and month and the day of the month of his visit, and who had previous to that date, when accumulation of gas had been discovered in said room or entry placed a conspicuous mark thereat, as notice to all men to keep out, and who at once reported the conditions of the said room to the mine manager; but the said defendant disregarding its duty in this behalf carelessly and negligently failed so to do; and the said defendant knowing the said conditions were unsafe, permitted divers persons, then servants of the defendant, including the plaintiff, to enter the said mine to work therein, otherwise than under the direction of the mine manager, before the said conditions had been made safe.

6. And that it then and there also became and was the duty of the defendant, by reason of the statute in such case made and provided, namely, section, chapter 93, Hurd's Statute, to employ a mine examiner to visit the mine each morning before the men were permitted to enter it, and to inspect all parts of the said mine where the men were expected to pass or to work, including the said room or entry of the south, west passageway or long wall, and the parts adjacent thereto, and to observe whether there were any recent falls or obstructions in said room, entries or roadways, adjacent thereto, or accumulations of gas or other unsafe conditions, as above previously mentioned, in that part of the said mine, known as the room

of the south west pasageway, and as the evidence of his examination of the said place, it was the duty of the mine examiner to inscribe on the walls thereof the month and the day of the month of his visit, and when the accumulation of gas was discovered in the said room or entry, it was the duty of the mine examiner to place a conspicuous mark thereat, as notice to all men to keep out, and to report his finding to the mine manager, and it was the duty of the mine examiner after making such inspection to make a daily record of the condition of the mine, as he found it, in a book kept for that purpose; and it was the duty of the defendant to preserve said book in the office for the information of the said defendant, the inspector, and all other persons interested; and it was the duty of the mine examiner to make this record in the said book each morning before the servants of the said defendant, including the plaintiff were permitted to descend into the mine, as by the statute of the state of Illinois in such case made and provided, namely, section, chapter 93, Hurd's Statute; but said defendant disregarding its said duty in this behalf did not have a mine examiner, who immediately prior to the date of 19.., daily visited the said mine, and all places therein where the men were expected to pass or work, including the part known as the room of the south, west passageway, and examined the same as required by the statute in such case, and who made a daily record of the conditions of the mine as he found it, in a book kept for the purpose; but the said mine examiner failed in his daily reports of the said mine on and for a long time prior to the said day of, 19.., to make a record of the conditions, as he found them in that portion of the mine known as the room of the, south, west passageway; and the defendant wholly failed to keep such record of the condition of the said portion of the mine for said dates aforesaid, in the office for the information of the defendant, the inspectors, and all other persons interested; and the examiner did not make the daily record on the said day of, 19.., as required by the statute, before the plaintiff was permitted to descend into the mine.

And that while the said plaintiff was thus engaged in about the said room or entry wherein the gas (sic) had accumulated, and in which in the due course of his employment he was required by the defendant to unload this dirt slate, stone, and other material, and while he was ignorant of the dangerous condition of the said mine by reason of the defendant's negligence aforesaid, and while the plaintiff was using due care and caution in and about his work of unloading the car, aforesaid, under the directions of the defendant, guided by the light of the customary miners' torch or light worn in his cap

for the purpose of giving light in the proper performance of his duties, the poisonous, inflammable and explosive gas (sic), aforesaid, which had accumulated in the said room or entry, known as the room of south, west, by reason of the defendant's negligence as aforesaid, became ignited and exploded with great violence from the torch required by defendant to be worn by the plaintiff; whereby plaintiff was greatly and grievously burned, injured, bruised, both internally and externally; that the plaintiff's head, face, arms and hands were thereby, then and there severely, dangerously and permanently injured and the plaintiff's sense of sight was then and there and thereby dangerously and permanently impaired; and the plaintiff was otherwise severely, dangerously and permanently injured both internally and externally, and has been sick, sore, and injured from the time of such explosion; and he has thereby suffered great bodily pain and mental anguish and still is languishing and intensely suffering in body and mind, and in future will continue to suffer from said injuries for the rest of his natural life; and is hindered from attending to his usual business affairs and employment and will be hindered from attending to his employment for the rest of his natural life, in consequence thereof; and by means of the premises the plaintiff was forced to and did then and there lay out divers sums of money in and about endeavoring to be cured of said hurts and injuries occasioned, as aforesaid. Wherefore, etc.

(West Virginia)

For this, to wit, that before and at the time of the committing of the grievances hereinafter mentioned, to wit, on the day of, 19.., the defendant was the owner and operator of a certain coal mine, in the county of aforesaid engaged in mining coal and manufacturing coke; that said plaintiff on the day and year aforesaid was in the employ of the said defendant, then and there engaged in the work and labor of mining coal in said mine, and loading same into mining cars of the said defendant, and in the said employment of the said plaintiff, and in the discharge of his duty in that behalf it became and was necessary for the said plaintiff to go into the entries, headings and working places of said mine to dig, mine and load coal as aforesaid; that said defendant then and there knowing that said mine generated fire damp gases and other dangerous gases in dangerous quantities, and that the same accumulated and existed in the entries of the said mine, negligently failed to employ a competent fire boss; neglected and failed to keep at said mine safety lamp or lamps as required by law; failed to have said mine examined, and to notify its employees of the accumulation and existence of said fire damp and other dangerous gases in said mine; negligently failed and refused to ventilate said mine; negligently

failed and refused to provide the necessary traveling ways, outlets, and other means of escape from said mine, there being more than twenty persons employed therein; and negligently failed to provide ample means of ventilation and to cause air to be circulated through the said entries, headings and working places of said mine so as to dilute, render harmless and carry off said dangerous and noxious gases, all of which was then and there the duty of the said defendant.

And the plaintiff says that the fire damp and other dangerous gases, which had been carelessly, negligently and knowingly permitted to gather and accumulate and exist therein by the said defendant as aforesaid, without the knowledge of the said plaintiff, exploded with great power and violence, and ignited and burned with great heat in and about where the said plaintiff was engaged in the discharge of his duties as such employee as aforesaid; by means whereof, he, the said plaintiff, was then and there at the county aforesaid bruised, wounded, burned, suffocated and injured.

And whereupon the plaintiff avers that by the reason of the premises and matters and things hereinbefore alleged and by virtue of the statute in such case made and provided, an action has accrued to him to have and demand of and from the said defendant, for and by reason of said grievances wrongs, and injuries in this declaration mentioned, damages in the sum of dollars.²⁰⁵

1581 Hole unguarded, Narr. (W. Va.)

For this, to wit, that, on the day of, 19.., the defendant was and now is the owner and operator of certain coal mines and coal works in the county, West Virginia, known as the coal mines or coal works, and was then and there engaged in operating said mines, in mining, marketing and removing the coal from said mines, and in such operations and incident and appurtenant thereto and in furtherance thereof defendant had constructed tramways, tracks, cars, tipples, entries, testles and other appurtenances, fixtures and appliances thereto necessary in the mining and removal of said coal, and among other appliances and appurtenances of the mines aforesaid of the defendant, defendant kept and maintained a track from its main entry of said mines, through and out of said main entry, passing out of said entry at the mouth thereof, known as the "bank-mouth" and from thence a short distance to its bank tipple, where coal is unloaded or dumped from the small cars coming out of said bank, into other cars to be transported to the river or railway for shipment; that the small loaded bank cars are required to be pushed by hand from near said bank-mouth over said bank track to the bank-tipple aforesaid, there to

²⁰⁵ *Squilache v. Tidewater Coal & Coke Co.*, 64 W. Va. 337 (1908).

be unloaded as aforesaid; that the ground from said bank-mouth to said bank-tipple is a steep hill-side, and to get a proper for said road from the bank-mouth to the bank-tipple, trestle work has been constructed which causes said tracks to be elevated near said tipple above the original surface; and that to prevent injury to persons necessarily walking on or along said tracks on said trestle work and to prevent their slipping or falling through the same, defendant did heretofore until the day and year aforesaid keep boards closely laid on said trestle work at a level with the bottoms of the ties on said tracks and paralled to the said ties, on the girders or sills on which said ties are laid thus heretofore affording a safe, secure way for persons who were required to walk on or along said tracks from being injured thereby, or from falling or slipping through said trestle between said ties.

The plaintiff avers that it was then and there the duty of said defendant to exercise reasonable care to keep the said tracks properly underlaid with boards so that persons who were required to walk over, on and along said tracks to the bank-tipple would not be in danger of slipping or falling, or falling through said trestles between any of said ties on which said tracks are laid, or otherwise be injured therefrom; but plaintiff avers that defendant did on the day and year aforesaid allow and have an opening to be made in the boards along and under said tracks, by a removal of boards therefrom, thereby creating great danger of slipping through or falling, to those persons who were required to walk over, on or along said tracks, which removal of, and opening in, said boards rendered said tracks dangerous, defective and insecure and unsafe to persons required to walk upon them as aforesaid, and of which the plaintiff did not have knowledge or notice.

That on the day and year aforesaid plaintiff was in the employ of said defendant as a laborer then and there engaged in pushing the small bank cars from near said bank-mouth over, along and on said tracks to the bank-tipple, there to be dumped or unloaded as aforesaid; that in said work of pushing said cars on, over and along said tracks, plaintiff was required to walk on, over and along the said tracks, behind the cars or at the side thereof on the ends of said ties, necessarily being in a position to obstruct from plaintiff's view the tracks aforesaid, so often as it became necessary to push from the bank-mouth the loaded cars aforesaid; that on the day and year aforesaid plaintiff was so employed by defendant and was at the said time pushing loaded bank cars on, over and along said tracks from said bank-mouth toward said tipple, and while then and there so employed and necessarily walking along, over and on said tracks and without fault of plaintiff, by reason of the opening made in said walk-way by the removal by defendant of the boards aforesaid from between said ties, and by reason of unsafeness, insecurity,

defectiveness and danger resulting from the removal of said boards and of the opening made by such removal, which defendant well knew and of which plaintiff did not know, plaintiff did slip and fall partly through said opening and in such manner that plaintiff's right arm was thrown under the bank car which he was then and there pushing, and could not be extricated therefrom, and the wheels of the bank car then and there passed over plaintiff's right arm, so crushing, wounding, and breaking the same that it thereby became necessary for plaintiff to have said arm amputated, which was done.

By reason of which said injuries resulting from the unsafeness, insecurity, defectiveness and danger of the tracks and walk-way aforesaid, caused by the removal by defendant of the boards from the tracks and walk-way aforesaid, and the injuries sustained by the plaintiff's fall caused thereby plaintiff was injured not only by the wheels passing over his arm as aforesaid, but from the fall itself and the blow thereof, and from the effects of said blow and fall and from the effects of the said wheels passing over his arm and crushing and bruising and breaking the same; plaintiff was then and there greatly bruised, wounded, hurt and injured, both externally and internally and had to have his right arm amputated as aforesaid, and by reason of said bruises, woundings, hurts and injuries plaintiff was and is permanently and forever disabled and prevented from following and pursuing his usual business, being that of laborer, and from performing any labor whatever; that by reason of said injuries plaintiff became and is sick, sore, lame and diseased and has so continued from the day and year last aforesaid, and hath during all of said time and still continues, and has by reason of said injuries during all of said time suffered great pain, and has during all of said time been prevented from attending to any of his lawful business or labor, and has been deprived of and lost divers great gains, profits and advantages which he might and otherwise would have derived and acquired; that he has also, by reason of said injuries, been obliged to pay and expend a large sum of money, to wit, the sum of \$. in endeavoring to be cured of said bruises, hurts and injuries, and has paid large sums amounting in all to \$. for care and nursing him in his sickness and disabilities aforesaid, and has been compelled to expend a large sum, to wit, the sum of \$. for medical and surgical attention caused by reason of his injuries aforesaid and by the amputation aforesaid. And by reason of the injuries aforesaid plaintiff has become permanently crippled and so injured as to disable him permanently, and to prevent him during his lifetime from pursuing his usual calling or any calling, or from supporting himself or his family.

Wherefore, plaintiff says that he is injured and has sustained damages to the amount of \$.²⁰⁶
 And therefore he brings this suit.

1582 Insufficient light, Narr. (Ill.)

For that whereas, on, to wit,, 19.., the defendant, was possessed of, using and operating a certain coal mine at county, Illinois, commonly called mine number, and the plaintiff was a miner employed by the defendant working in said mine; that the statute of the state of Illinois then and there in force provided as follows: (Set out section or provision).

And the plaintiff further avers that the defendant not regarding its duty and the provisions of the statute in that behalf, wilfully failed to comply with the said provisions of the statute, and by means thereof, on, to wit,, 19.., the said descended into said mine to go to his work, and, while exercising due care and caution for his own safety, fell over a block of wood there at the bottom of said shaft at the landing; and thereby his right leg between the knee and the thigh was crushed and bruised, and he was permanently injured and confined to his bed for a long time, and thereafter was compelled to go on crutches for several weeks, and was unable to do or perform any of his usual work for several months, and lost the moneys which he could and would have earned; and by means of said injuries plaintiff suffered great pain both in body and mind, and still suffers and will continue to suffer therefrom, and was compelled to become liable for the services of a physician, medicine, etc., while attempting to be cured of his said injuries; and by means thereof and on account of said injuries aforesaid, plaintiff has suffered loss and damage to the amount of dollars, and therefore he brings this suit, etc.

1583 Props, action

The mine operator is liable for an injury sustained by a miner by reason of the operator's failure, after demand of the same by the miner, to supply props, cap-pieces and cross-bars for the purpose of securing the over-hanging roof of the mine, although the mine manager, after a visit to the mine, was of opinion that the timbers, props, and caps were sufficient.²⁰⁷

²⁰⁶ Priddy v. Black Betsey Coal & Mining Co., 64 W. Va. 242 (1908).

²⁰⁷ Springfield Coal Mining Co. v. Gedutis, 227 Ill. 9, 11 (1907).

1584 Props, Narr. (Ill.)

For that whereas, the defendant was, on, to wit, the day of and still is and was for a long time prior thereto, the owner of and was operating a coal mine in county, Illinois; said coal mine consisting, among other parts, of a shaft, underground passages, passage-ways, entries, rooms, pillars, etc.; that on said day the plaintiff was working for and in the employ of the defendant, as a coal miner or coal digger in the defendant's said mine and had been so working for and in the employ of the defendant for some time prior to said day.

And the plaintiff avers that it then and there became and was the duty of the defendant to have provided plaintiff with a sufficient supply of props, caps and timbers, delivered on the miner's cars at the usual place, as nearly as possible in suitable lengths and dimensions for the securing of the roof of the working place of the plaintiff on the day aforesaid; that he, the plaintiff had prior to the injury herein complained of made demand of defendant's mine manager, for props, caps and timbers; yet, the defendant wilfully and knowingly failed and neglected to provide plaintiff with a sufficient supply of props, caps and timbers, on the day aforesaid, after demand therefor as aforesaid, delivered on the miner's cars at the usual place, as nearly as possible in suitable lengths and dimensions for the securing of the roof in plaintiff's working place, as is by statute made and provided; whereby and by reason of the premises and by reason of the wilful failure and neglect on the part of the defendant a large quantity of slate, rock and dirt, in plaintiff's working place fell from the roof of said place upon and against the plaintiff and he was thereby and by reason of the premises injured as hereinafter alleged.

2. And the plaintiff avers that on the day aforesaid and for some time prior thereto, there was and had been a dangerous condition existing in plaintiff's said working place, consisting of a large quantity of loose slate, rock and other substances forming and composing a part of the top or roof of plaintiff's said working place, of which dangerous condition of said mine the defendant knew or by the exercise of reasonable care should have known; that on the day aforesaid and on the morning of said day, before plaintiff entered said mine to work therein, said dangerous condition aforesaid then existed; that defendant wilfully permitted plaintiff to enter said mine, and wilfully failed and neglected to prevent or attempt to prevent plaintiff from entering said mine and said working place on the day aforesaid; but, on the contrary wilfully suffered, permitted and allowed the plaintiff to enter said working place to work therein, without the directions or without being under the direction of the mine manager, before said dangerous place was made safe and while such dangerous

place then existed, whereby and by reason of the premises, plaintiff entered his said working place on the day aforesaid to work therein.

And while so working therein he was struck by said loose rock, slate and other substances which fell from the roof aforesaid, and which fell upon and against the plaintiff; and plaintiff was thereby and by reason of the premises crushed, bruised, and wounded, the bones of his legs broken, the bones of his feet and ankles crushed, broken and other bones of his body broken and crushed, his ankle joints sprained, strained and the ligaments of his ankle and legs strained and twisted; and he was otherwise severely and permanently injured, and he became and was sick, sore, lame and disordered and disfigured, and so remained from thence hitherto; and by reason thereof has suffered and still suffers great physical and mental pain and anguish; and he was hindered and prevented from attending and transacting his business and affairs and was compelled to and did lay out and become liable for large sums of money, to wit, dollars, in and about endeavoring to be healed and cured of his said injuries; and he will thereby continue to suffer pain and loss; wherefore, etc.

(West Virginia)

For this, to wit, that at and before the time of the commission of the grievances, wrongs and injuries by the defendant hereinafter complained of, to wit, on or about the day of, 19.., in the said county of, the said defendant was the owner and operator of a certain coal mine in the said county of and was then and there operating the said mine, in which said mine there were main drifts and entries, air courses, passage ways, main headings, cross headings, etc., under the surface of the earth, and extending from the main drift and entry of said mine were many lateral drifts or rooms in the interior of the said mine, in which said mine the defendant carried on the business of mining and excavating large quantities of coal which was mined, excavated and taken therefrom by the said defendant and its servants and employees.

That the said defendant in conducting its said business of mining and excavating coal as aforesaid, employed a large number of men who worked in its said coal mines for the said defendant at its instance and request for hire and reward to them in that behalf; that before and at the time of the committing of the grievances, wrongs and injuries by the said defendant hereinafter complained of, the plaintiff was in the service and employ of the said defendant as a laborer in its said mine in the county aforesaid, and was engaged in digging, mining, excavating and removing coal for the said defendant

in its said mine aforesaid at the request and solicitation of the said defendant.

And it then and there became and was the duty of the said defendant to furnish to the plaintiff a reasonably safe place wherein to work while so employed as its servant and laborer in its said mine as aforesaid and to use all due care, caution and diligence to prevent dangers, accidents and injuries to the said plaintiff while so engaged as a servant and laborer in the said defendant's mine as aforesaid, and to cause all loose coal, slate and rock overhead in the rooms, air courses, drifts, passage ways and working places in said mines to be removed or carefully secured, and to see that its said mine, drifts, air courses, rooms, passage ways, etc., were kept in a reasonably safe condition so as to prevent danger and accident to persons employed in said mine and, especially to the plaintiff, who was then and there employed by the defendant in its said mine as its servant and laborer.

That the said defendant wholly disregarding and neglecting its duty in this behalf did not use all due care, reasonable and proper means and precaution, nor any means and precaution whatever, to provide a safe and convenient place for the said plaintiff to work in; that the said defendant did not use due care and means nor take reasonable and proper precaution to cause all loose coal, slate and rock overhead in the rooms, air courses, drifts, passage ways and working places in its said mine to be removed or carefully secured so as to prevent danger and accident to persons employed in said mine, and especially to this plaintiff while so employed in said mine by the defendant as its servant and laborer therein; but on the contrary thereof, the said defendant did unlawfully, negligently, wrongfully and knowingly, refuse to furnish to the said plaintiff while in its employ as aforesaid, a reasonably safe place in which to work and refused to cause all loose coal, slate and rock overhead in the rooms, air courses, drifts, passage ways and working places in said mine to be removed or carefully secured so as to prevent danger and accidents to the said plaintiff while so employed as a servant in the said mine of the defendant; and the said defendant did unlawfully, unskillfully, wrongfully and knowingly permit loose coal, slate and rock to remain overhead in the rooms, air courses, drifts, passage ways and working places in its said mine without removing the same or causing it to be safely secured so as to prevent danger and accident to the plaintiff, as aforesaid, while so working in its said mine, as aforesaid, of which said negligent and unskillful acts of the said defendant, said plaintiff was wholly ignorant.

2. Also it became and was the duty of the said defendant in order to better secure the safety of its said mine, drifts, entries, air courses, passage ways, rooms, etc., for the security and safety of persons employed therein, to employ a competent

and practical inside overseer to be called "mining boss," who shall be a citizen and an experienced coal miner or a person having two years' experience in a coal mine.

Yet, the said defendant wholly disregarding its duty in this respect, knowingly, negligently and unlawfully refused and failed to employ a competent inside overseer, to be known as and called a mining boss, in order to better secure the safety of its said mine as aforesaid, that the person, to wit, one, so employed by the said defendant as aforesaid as inside overseer and mining boss was incapable and incompetent to discharge the duties required of him by law and was careless, indifferent and negligent in the discharge of his duties as said inside overseer and mining boss as aforesaid; all of which was then and there well known to the said defendant and was unknown to this plaintiff.

And the plaintiff says that by reason of the said careless, negligent and wrongful acts of the said defendant in permitting said loose coal, slate and rocks to remain overhead in the rooms, air courses, drifts, passage ways and working places in said mine and in failing and refusing to cause the same to be removed or carefully secured so as to prevent danger and accident to the plaintiff while in the employ of the said defendant as a laborer in its mine as aforesaid, and by reason of the failure and refusal to employ a competent inside overseer, to wit, on the day of, 19.., in the said county of and while the said plaintiff was engaged in the service of the said defendant as a laborer in its said mine as aforesaid and while said plaintiff was using due and reasonable care for his own safety while so employed in said defendant's mine, as aforesaid, and without any knowledge on the part of the said plaintiff of the dangers to which he was then and there exposed and without any negligence or default upon the part of said plaintiff, a large piece of loose slate, hanging overhead in said mine at the place where the said plaintiff was then and there at work in the lawful and proper discharge of his duty as a servant of the defendant aforesaid, fell upon the said plaintiff, without any want of care or negligence on his part, and that he was thereby greatly bruised, mangled and injured upon his legs, hips, arms, head, and body and has sustained permanent and lasting injuries by reason thereof, and has suffered great pain and anguish and does still suffer great pain by reason of the injuries inflicted as aforesaid, and that he has been compelled to incur great expense in his effort to be cured and healed of his said injuries and hurts incurred as aforesaid, to wit, the sum of dollars.

Wherefore an action hath accrued to the said plaintiff to have and demand from the said defendant for and by reason of the wrongs, injuries and grievances heretofore complained of, and the plaintiff avers that by reason of the matters and

things heretofore alleged, the plaintiff has sustained damages to the amount of dollars, and therefore he sues.

1585 Tools, machinery defective, action

No action for the violation of sections 16 and 18 of the Mining act can be based upon defective tools or machinery which are not a part of the physical condition of the working places of the mine making that part dangerous.²⁰⁸

1586 Tramway track, construction, action

The laying of a track near the rib of a mine is not a violation of the statutory provision concerning the construction of tramway tracks in the run-around, if a sufficiently clear space or place of refuge at the working place of the men is left on either side of the track.²⁰⁹

1587 Trapper, ventilation, action

Mine owners or operators are liable for an injury resulting from the failure to keep an attendant to open and close the door used in guiding, directing ~~and ventilating~~ current in a mine.²¹⁰ Any doorway which is essential to the ventilation of any portion of the face of the coal where miners are at work and which is in frequent, regular and habitual use for the hauling of cars while coal is being mined, is a principal doorway within the meaning of the statute; and whether a particular doorway is within the foregoing rule is a question of fact. The owner or operator of a coal mine is charged with knowledge which of the doorways of the mine is a principal doorway, and the failure to provide a trapper at a principal doorway constitutes a wilful violation of the statute.²¹¹

1588 Trapper, want of, Narr. (Ill.)

For that whereas, the defendant, the, a corporation, organized and doing business under and by virtue of the laws of the state of Illinois, was, on, to wit, the day of, 19.., the owner and operator of a cer-

²⁰⁸ Pate v. Blair-Big Muddy Coal Co., 252 Ill. 198, 208, 204 (1911); Secs. 16, 18, Mining act 1909 (Ill.).

²⁰⁹ Cook v. Big Muddy-Carterville Mining Co., 249 Ill. 49.

²¹⁰ Madison Coal Co. v. Hayes, 215 Ill. 625, 626, 627 (1905).

²¹¹ Karkowski v. La Salle County Carbon Coal Co., 248 Ill. 195, 198, 199 (1911); Cl. f. sec. 19, Mining act 1909.

tain coal mine located in the eastern extremity of the city of county of and state of Illinois, known as the "....." which said coal mine was operated by means of a perpendicular shaft extending many feet down below the surface of the earth and by main entryways and passageways, leading at right angles away from the bottom of said perpendicular shaft, and by other passageways and entryways with rooms thrown off the same, driven off of and leading away from said main entryways, into and up to the face of the coal or workings where the various miners then in the employ of the said defendant were mining or digging coal.

And whereas the plaintiff on the day aforesaid, and for sometime prior thereto was in the employ of the said defendant in and about its said coal mine as a driver, and in and about the performance of his duties in that capacity for the said defendant, it became and was the duty of the plaintiff to haul cars loaded with coal by the said various miners who were then and there mining said coal in the said entryways and rooms, through, over and upon a certain pair of tracks then and there laid along and upon the said entryways and passageways that lead from the face of the coal out to the bottom of the said perpendicular shaft where said cars were brought for the purpose of being hoisted to the surface; that in order to perform the duties assigned to him, plaintiff was supplied by the said defendant with a certain mule and with certain coal cars, such as are ordinarily used for the conveyance of coal in mines of this character; all of which were then and there the property of the said defendant.

And the plaintiff avers that on the day aforesaid, among other entryways and passageways, into, over and upon which the plaintiff was compelled to go in the performance of his duties in the capacity as aforesaid, was a certain entryway known as the north entry off of the west entry off of the main north entry in said shaft; that in this said entryway at or about the foot of an incline or hill in said entryway and about feet from the head of said entryway, the said defendant had and maintained a certain principal doorway, constructed of wood and of large and heavy timbers, through which the cars loaded as aforesaid, by the said miners working at the face of the coal, were hauled by the plaintiff, when taking the same out to the bottom of said perpendicular shaft.

And the plaintiff avers that it then and there became and was the duty of the defendant, under and by virtue of the statutes of the state of Illinois to have and maintain at said principal doorway, through which the said cars were hauled by the plaintiff, an attendant or "trapper" for the purpose of opening and closing said door when trips of cars, so being hauled by the plaintiff, as aforesaid, were passing to and from

the workings or the face of the coal, so being mined as aforesaid.

Yet, the defendant, disregarding its duty in that behalf, on the day aforesaid, to wit, on the day of, 19.., and for a long time prior thereto, to wit, for a period of months, knowingly, deliberately, consciously and wilfully and in express violation of the statutes of the state of Illinois failed and neglected to have an attendant or a "trapper" employed and stationed at the principal doorway aforesaid, for the purpose of opening and closing the said door when trips of cars were passing to and from the said workings or the face of the coal at the head of said entry, notwithstanding that on the day aforesaid, the plaintiff was compelled to and did, in the performance of his duty, haul trips of loaded coal cars through said principal doorway.

By means whereof, the plaintiff, on, to wit, the day aforesaid while in the direct line of his employment, and in the discharge of his duties as a driver, was passing along, over and upon the said north entry off of the west entry off of the main north entry, and while engaged in hauling a trip of loaded coal cars from the workings at the head of said entry, the plaintiff approached said principal doorway and on account of the said deliberate, conscious, knowing and wilful violation of the said statutes of the state of Illinois by the said defendant, in failing to have an attendant or "trapper" stationed at said principal doorway for the purpose of opening and closing the same, when the said trip of cars were passing to and from the said workings at the head of said entryway, the said door was not opened but remained securely closed and fastened; and the said mule being driven by the plaintiff then and there collided with and ran upon and against said principal door; and said mule then and there tried and attempted to force or push his way through the said principal door or doorway, and the said trip of cars ran upon and against said mule and became entangled with him; and the plaintiff was then and there thrown to and from the said trip of cars, then being hauled by him, as aforesaid, and the said mule and the said cars then and there ran upon and against the said plaintiff and he was then and there crushed and pushed up and against the said door and the framework of said door and the side of said entryway; and thereby then and there the plaintiff was badly crushed, bruised and mangled; and the plaintiff's left leg was crushed and broken and seriously and permanently injured; and the plaintiff's arms, legs, back, chest and spinal column were seriously crushed, bruised and injured; and he became sick, sore, lame and disordered and so remained for a long time, to wit, from thence hitherto; during all of which time he suffered great pain and was hindered from transacting his business and affairs; and also by means of the premises he was obliged to

and did lay out divers sums of money amounting to dollars, in and about endeavoring to be healed of his said wounds, sickness and disorder; and the plaintiff avers that his said injuries are permanent. Wherefore, etc.

1589 Motor or trolley unsafe, Narr. (Ill.)

For that whereas the defendant was heretofore, to wit, on or about the day of, 19.., a corporation, etc., and as such corporation was possessed of and operated and controlled a certain street railroad in the county aforesaid, which was then and there laid on and along a certain street commonly called street, which street was then and there a public highway; that on, to wit, the day and year and at the county aforesaid, plaintiff was an employee of the said defendant in the capacity of a conductor upon a certain motor or trolley car of the defendant, which was then and there used upon and along said street railroad; that on, to wit, the day and year and at the county aforesaid, the defendant was then and there possessed of a certain other motor or trolley car, which was then and there used by the said defendant for the purpose of conveying passengers on and along said street railroad, which said other motor or trolley car was then and there under the care and management of divers then other servants of the defendant, who were then and there driving the same upon and along said street railroad near a certain other street commonly called street.

And the plaintiff avers that it then and there became and was the duty of the defendant to furnish to its other servants as aforesaid a reasonably safe and proper motor or trolley car; but not regarding its said duty in this behalf, the said defendant then and there furnished to its said other servants an improper, unsafe and defective motor or trolley car, which improper, unsafe and defective condition of said motor or trolley car was to the defendant well known, or which, by the use of reasonable diligence, might have been known; by reason whereof the said motor or trolley car then and there, and while the plaintiff was then and there using due diligence for his own safety, ran and struck with great force and violence upon and against the plaintiff.

2. And the plaintiff further avers that the said defendant furnished to its other servants, who were then and there in charge of said other motor or trolley car as aforesaid, an improper, unsafe and defective instrument, commonly called a reverse lever, or power handle, wherewith to operate and control the motor or trolley car, last aforesaid; which improper, unsafe and defective condition of said instrument was to the defendant well known, or by the use of ordinary care might

have been known; and by reason of such improper, unsafe and defective reverse lever, or power handle, the said motor or trolley car then and there ran and struck with great force and violence upon and against the plaintiff, who was then and there upon said railroad in the line of his duty as an employee of the said defendant as aforesaid, and who was then and there using due care and diligence for his own safety.

By means whereof plaintiff was then and there thrown with great force and violence to and upon the ground there, and was thereby then and there greatly bruised, hurt and wounded, and divers bones of his body were then and there broken; and he became and was sick, sore, lame and disordered, and so remained for a long space of time, to wit, from thence, hitherto; during all of which time the plaintiff suffered great pain and agony, and he thereby became and was and is permanently injured, and was thereby hindered and prevented from attending to and transacting his affairs and business; and by means of the premises the plaintiff was obliged to and did then and there lay out divers sums of money, amounting to dollars, in and about endeavoring to be cured of his said hurts, wounds and bruises, occasioned as aforesaid. Wherefore, etc.

1590 Moving steam cars, action

An attempt to get on or off a moving train of steam cars without the direction of an agent of the railroad company is not negligence *per se* in Illinois. But whether a person is guilty of such contributory negligence as would bar his recovery for an injury caused by stepping on or jumping off a moving train of cars is a question of fact to be determined by the jury under all of the attendant and surrounding circumstances.²¹²

1591 Moving street cars; action

An injury caused by the negligent increase of speed of a slowly moving street car is actionable, as it is not negligence *per se* to get on and off a slowly moving car propelled by horse-power, cable or electricity.²¹³

1592 Nitric acid, workman injured, Narr. (Mich.)

For that whereas, the said defendant is a corporation organized under the laws of the state of Michigan, and at the time of the committing of the grievances hereinafter alleged was engaged in the manufacture of nitric acid at its plant or

²¹² Ardison v. Illinois Central R. Co., 249 Ill. 300, 302 (1911).

²¹³ Chicago Union Traction Co. v. Hanthorn, 211 Ill. 367, 369 (1904).

establishment on avenue, in the city of That the nitric acid so manufactured by said defendant is a dangerous chemical or article to come in contact with, and when exposed gives out noxious and dangerous fumes and rapidly eats its way into objects that it comes in contact with and renders vessels or receptacles in which it is placed, including crocks or jars, brittle, so that a very slight jar or concussion thereof will cause such crock or jar to break and release its contents of nitric acid, more especially when such vessel or receptacle is full or nearly full. That when the acid comes in contact with the body it burns the flesh and rapidly eats its way therein; all of which facts were then and there well known to said defendant.

That at the time of the committing of the grievances hereinafter alleged in one of the rooms of said defendant's plant or establishment it kept and maintained a pit of approximately the following dimensions: about eight (8) feet in length by four (4) feet in width, and having a depth of about five (5) feet below the floor level, which pit was walled in by brick, and the floor of which was up to a short time prior to the committing of said grievances, entirely paved with brick, but in which shortly before said time, said defendant caused to be dug an opening in the floor of said pit along one side thereof about six (6) feet long by two (2) feet wide and of a depth of about two (2) feet, the sides and floor of which it caused to be cemented, and which pit at the time of the committing of the grievances hereinafter mentioned, contained three (3) large, heavy jars or crocks or receptacles used by said defendant for storing nitric acid, and which in height were almost level with the top of said pit and had a capacity of about gallons of nitric acid each, and some of which were at the time aforesaid partially filled and others nearly full thereof, and which while containing acid were kept covered to prevent the noxious fumes from escaping.

That said pit at the times aforesaid had no means of entrance or exit except to jump in and climb out as best one could and was a dangerous place to work in, particularly while said jars, crocks or receptacles were being moved from where they were located therein to other parts of said pit, and which jars, crocks or receptacles aforesaid had been used by the defendant for storing nitric acid therein for a long period of time, to wit, years and upwards prior to the committing of said several grievances; all of which facts were well known to said defendant and unknown to the plaintiff, who had entered said defendant's employ about a month previous thereto.

That it then and there became and was the duty of said defendant to furnish safe and sound crocks, jars or receptacles for the storage of nitric acid while the same were in said pit, and to exercise great caution to ascertain whether the same

had not become brittle and weakened by reason of the action of the nitric acid contained therein; and to cause due inspection to be made thereof at reasonable intervals, so that defects and weakness therein due to the action of nitric acid could be discovered and thereby guard against the use of brittle, unsound or defective crocks, jars or receptacles of said description.

And it then and there also became the duty of said defendant to acquaint those who were required to work in said pit in the moving of said crocks, jars or receptacles, of the result of such inspection and of the brittle and weakened condition of said crocks, jars or receptacles; and not to sanction or allow them to work in said pit in the moving about of said crocks, jars or receptacles while the same were in a brittle, weakened or unsound condition as aforesaid.

That it then and there also became the duty of said defendant to provide ladders or steps or other means of getting out of said pit, so that in the event of said crocks, jars or receptacles breaking and the contents being emptied or partly emptied into said pit, the person or persons working therein might quickly escape therefrom without the necessity and difficulty of climbing up and out of the same, and thus to avoid coming in contact with said acid or any quantities thereof.

That it further then and there also became the duty of said defendant while persons were working in said pit to use good, safe and sound crocks, jars or receptacles in which nitric acid was stored therein, so that there would be no danger of their breaking while being moved around in said pit or through any jar or concussion which might take place during the moving thereof; and that at and before the time of the committing of the grievances aforesaid, it became and was the duty of said defendant to inform those whom it required to enter and be in said pit, and who might or should be engaged in moving said crocks or jars about therein, of their brittle, unsound and unsafe condition and of their likelihood to break through any jar or concussion while the same were being moved.

That the said defendant wholly neglected its duties in the several particulars aforesaid, and while so neglecting its said several duties in the several particulars aforesaid, to wit,, 19.., said plaintiff who was unfamiliar with the brittle, unsafe and unsound condition of the crocks or jars contained in said pit, and who had never worked therein prior to the occasion hereinafter set forth, or in the moving of said crocks, jars or receptacles, was directed by the foreman and superintendent of said defendant to enter into said pit and move some of said crocks, jars or receptacles from where they were stationed to other parts of said pit.

That on the day and year last aforesaid, pursuant to said direction and request, plaintiff entered said pit and proceeded

to move one of the crocks, jars or receptacles therein, which was nearly filled with nitric acid, from one part of said pit to another, and while engaged in so moving the same without fault or negligence on his part, a crock, jar or receptacle (which was then and there brittle and defective but which defects were then and there unknown to plaintiff and were well known to the defendant, or if not known should have been, in the exercise of due and proper care on its part) cracked and broke and a section thereof fell out and released the contents of nitric acid therein, which ran in and over the said pit and onto, over and against said plaintiff; and by reason thereof, and of there being no ladder or means of exit from said pit, except by climbing out therefrom, said plaintiff was horribly burnt by said nitric acid coming in contact with his person, particularly his back, legs and feet, which acid ate into his flesh, destroyed the muscles, tendons, arteries, tissues and veins therein, caused sores and ulcers to form thereon and caused him to become permanently crippled, disabled and disfigured, and caused him great pain and suffering and injury to his health, and caused him to languish in great pain and to be confined to his bed for a long period of time, to wit, weeks and upwards, and caused him then and there to become greatly disordered in mind and body thereby preventing him from following his employment and earning a livelihood in the capacity in which he had been employed by said defendant and otherwise; and then and there caused great wounds and sores to form upon his back, limbs and feet, and permanently injured his health and permanently unfitted him for heavy or difficult labor, and rendered it difficult and impossible for him to stand any length of time on his feet, and to bend over and to become cured in his body and health; and thereby greatly shortened his life, and then and there caused him to incur large outlays for medical attendance, nurses and medicines in and about his efforts to cure himself.

Plaintiff further says that prior to the coming in contact with the nitric acid as hereinbefore set forth, he was a strong, healthy, able-bodied man, capable of doing all sorts of labor, and that since his injuries aforesaid, he is no longer able to work as before or do heavy labor, and is greatly broken in health and mind, and continues to suffer great pain from his wounds aforesaid; and his nervous system has by reason of the injuries and the shock therefrom, become greatly impaired and permanently affected.

That by reason of the premises and of the wrongful acts and negligence of the said defendant aforesaid, said plaintiff has suffered great damage in, to wit, the sum of dollars; (.....) wherefore he brings this suit.

1593 Obstruction in street, Narr. (Ill.)

For that whereas, the defendant was on the day of, 19.., possessed of a certain public street known as street, extending in a northeasterly direction between avenue and avenue, in said city, and that thereupon it became and was the duty of the defendant to use reasonable care to see that the said street was in a reasonably safe condition for public travel; but the defendant, not regarding its duty in that behalf, negligently, after due notice thereof, permitted a dangerous obstruction to be and remain in said street, at about feet southwest from said avenue between the intersection of the said avenue and the said avenue in the said city.

And the plaintiff avers that on the day of, 19.., while driving along and upon said street and in the exercise of due care and caution for her own safety, and without being aware of the presence of said obstruction in said street, she came in collision with said obstruction and was thereby thrown violently to and upon the ground there, and was thereby greatly injured about her body, limbs and internal organs, nerves and nerve centers; and thereby she became, was and is paralyzed in her left side and left leg; and she became and was sick, sore, lame and permanently injured and disordered, and so remained for a long space of time, to wit, from thence hitherto; during all of which time, the plaintiff thereby suffered great pain and was hindered and prevented from performing and transacting her affairs during that time to be performed and transacted; and also thereby the plaintiff was obliged to and did necessarily lay out divers sums of money, amounting to dollars, in and about endeavoring to be healed of the said bruises, wounds, sickness, soreness, lameness, and disorder so by the defendant occasioned as aforesaid.

And the plaintiff aver that on the day of, 19.., being within six months of the date of the injuries aforesaid, she caused to be filed in the office of the city attorney of the said city of and also in the office of the city clerk of, a statement in writing in the words and figures following:

To the city of the city attorney thereof and the city clerk of said city.

You are hereby notified, that received an injury while driving in a one-horse carriage in, along and upon street, between avenue and avenue in the city of county of in the state of Illinois, by her said carriage coming in collision with an obstruction in the said street, on the evening of the day of, 19.., at about

the hour of o'clock .. M.; that the place particularly where the injury occurred is on street about feet southwest from said avenue and between the said avenue and the said avenue; that the name of the person injured is; that a cause of action has accrued to the said by reason of the said injuries, received as aforesaid; that she is about to bring an action against the said city for the injuries so received, as aforesaid; that the place of residence of the said is street in the city of, Illinois; and that the attending physician of the said is residing at street.

Received copy, etc.

2. And for that whereas, the defendant on the day of, 19.., was possessed of a certain public street known as street in said city, extending between and intersected by avenue and avenue in said city, it therefore became and was the duty of the defendant to use reasonable care to see that the said street was in a reasonably safe condition for travel thereon; but, the defendant, not regarding its duty in that behalf, negligently permitted a dangerous obstruction, to wit, two posts, to be and remain in said street, at a point about feet southwest from said avenue, in the said city of and which said posts had remained in said street for such a length of time that the said city by the exercise of ordinary care, should have known of their existence in time to have removed the same prior to the said day of, 19...

And the plaintiff avers that on the day of, 19.., in the evening of said day, after dark, while driving in a one-horse carriage along and upon said street and in the exercise of due care and caution for her own safety, and without being aware of the presence of the two said posts in said street, the carriage in which the plaintiff was riding, came in collision with the said posts, and she was thereby thrown violently from her said carriage to and upon the ground there and was thereby so greatly and seriously injured about her body, limbs and internal organs, and her nerves, nerve centers and nervous system were so greatly shocked, injured and disordered that she became, was and is permanently injured; and the plaintiff thereby suffered great pain and was hindered from performing and transacting her affairs during that time to be performed and transacted; and the plaintiff thereby was obliged to and did necessarily lay out divers sums of money, amounting to dollars, in and about endeavoring to be healed of her wounds, sickness and disorder so by the defendant occasioned as aforesaid.

And for other wrongs the defendant to the plaintiff then and there did, to the damage of the plaintiff, and against the peace of the people of this state. Wherefore, etc.

b

For that whereas, long prior to and, on, to wit, the day of, 19.., the defendant was a municipal corporation and was then and there possessed of and in control of a certain east and west public highway known as street, within the corporate limits of said city in the county and state aforesaid; that the defendant was long prior to and then and there possessed of and in control of a certain street railway running laterally along said public highway; that said defendant prior to the time of the injury hereinafter complained of wrongfully and negligently threw or dumped such large quantities or piles of cinders along side of its said railway in the vicinity of the intersection of said public highway with street, as to create a dangerous obstruction to travel in vehicles upon said public highway, and it then and there wrongfully and negligently suffered and permitted said cinders to so remain on said public highway during the day and night time.

And the plaintiff further alleges that said railway company had been accustomed to so dump or throw such cinders on said highway and to permit the same to remain there for a sufficient length of time prior to the occasion in question so that the defendant, the city of knew or by the exercise of ordinary care in that behalf could have known of said railway company so throwing or dumping said cinders and permitting the same to remain on said public highway as aforesaid before and upon the occasion in question; but the said defendant city of wrongfully and negligently suffered and permitted the said defendant to so throw or dump said cinders on said highway, and it wrongfully and negligently suffered and permitted said cinders so thrown and dumped on said highway by said defendant as aforesaid to be and remain on said highway until the time of the injury hereinafter complained of.

And the plaintiff further alleges that said piles of cinders constituted a dangerous obstruction to travel in vehicles along said public highway; and that it was then and there the duty of each of said defendants to exercise reasonable care toward placing or seeing that a light was placed and maintained on said piles of cinders during the night time, so as to warn persons riding along said public highway of the existence and presence of said piles of cinders; but that each of said defendants not regarding their said duty wrongfully, negligently and improperly failed to exercise reasonable care toward placing a light or seeing that a light was placed and maintained on said

piles of cinders, and as a result and in consequence thereof, no light was placed or maintained on said piles of cinders on the occasion in question which was in the night time, but therein wholly made default.

And the plaintiff further alleges that at the time and place aforesaid he, the plaintiff, was an officer, to wit, a marshal or battalion chief of the fire department of the city of, and upon the occasion in question which was in the night time and while dark, the plaintiff, in the discharge of his duties as such officer was riding in a wagon westward along said public highway and while so riding, and while, as he alleges, he was exercising ordinary care and caution for his own safety, by reason and as a direct result of the absence of a light to indicate the presence or existence of said piles of cinders so dumped and permitted to remain on the said public highway as aforesaid, his buggy ran against and upon said piles of cinders and plaintiff was thereby then and there thrown violently from said buggy to the ground there, and his left leg was thereby then and there broken near the thigh and his left knee was wrenched, sprained and otherwise injured and divers other bones of his body were thereby then and there otherwise seriously and permanently injured externally and internally, and he sustained a serious and permanent shock to his spine and nervous system; and as a direct result and in consequence of his said injuries, sickness and disorders occasioned as aforesaid he became and was crippled, sick, sore, lame and disordered, and so remained for a long space of time, to wit, from thence hitherto, and so will continue to remain permanently, during all of which time he has suffered great pain, and has been hindered and prevented from attending to and transacting his ordinary business, and will continue permanently to be hindered and prevented from attending to and transacting his business and affairs; and thereby has been and will continue permanently to be deprived of great gains and profits which he might and otherwise would have made and acquired; and has been compelled to and did incur, expend and lay out divers large sums of money amounting to, to wit, dollars, in and about endeavoring to be cured of his said injuries, sickness and disorders occasioned as aforesaid. To the damage, etc. (Add averment of notice as in Section 1613)

1594 Open switch, Narr. (Ill.)

For that whereas, heretofore, to wit, on the day of, 19.., at, to wit, in the county aforesaid, the said defendant was possessed of and was operating a certain line of railroad extending through the city of in said county to a certain other point, to wit, the village of in said county, upon which the said defendant was then and there operating divers cars by means of electric power for the

carriage of passengers for hire; that in consideration of a certain reward by her paid to said defendant in that behalf, plaintiff then and there became and was a passenger upon one of the said cars, to be carried from a certain street in the said city of in a northerly direction to a certain station upon the said line of railroad, to wit, the village of, in said county; that when said car in which said plaintiff was then and there riding as a passenger, as aforesaid, thereafter reached a point, to wit, a point on its said right of way about mile north of the said city of, at and near what is known as the ".....," at said point, and at and near a certain siding or switch track belonging to and used by said defendant, and connected by means of a certain switch with the main track upon which said car was then and there proceeding, a certain other car then and there belonging to and used and operated by the said defendant was then and there left standing upon said siding or switch track in such position that but for the negligence of the said defendant hereinafter charged, the said car upon which the said plaintiff was then and there riding could have passed over and along said main track and around the car so standing upon said siding or switch track, as aforesaid.

And while the said plaintiff with all due care and diligence was then and there riding in the said car along and upon the said defendant's right of way at the place aforesaid, the said defendant then and there by its said servants, so carelessly and improperly drove and managed the said car in which the said plaintiff was riding as a passenger as aforesaid, that by and through the negligence, mismanagement and unskillfulness of the said defendant by its said servants in that behalf, the said car then and there ran into and struck with great force and violence upon and against a certain other car belonging to and then and there used and operated by the said defendant.

2. And the said plaintiff avers that it also then and there became and was the duty of the said defendant so to move its said car and so to arrange and adjust its said switch that the passage of these two cars would be effected without injury or peril to any of its said passengers; but the said defendant, not regarding its duty in this regard, then and there negligently and carelessly caused the said car upon which the said plaintiff was then and there riding to approach the said car so standing upon the said siding or switch track, as aforesaid, with great and dangerous speed, and then and there negligently omitted to have its said switch so fixed and adjusted that the said car upon which the said plaintiff was then and there riding would safely pass the said car so standing upon the said siding or switch track, as aforesaid, but, on the contrary, and not regarding its duty in that behalf, the said defendant then and there negligently omitted to have the said switch closed, and the said switch was then and there open, and the said car

upon which the said plaintiff was then and there riding turned in upon the said switch track and continued to approach the said standing car with great and dangerous speed, to wit, at the rate of miles per hour, and the said car upon which the said plaintiff was then and there riding then and there ran into and struck with great force and violence upon and against said car so standing upon said switch track, as aforesaid.

3. And it also then and there became and was the duty of the said defendant to use and exercise great care and caution in the management and operation of its said car by its servants, in that it was then and there the duty of its said servants to run and operate its said car at such a rate of speed that the said car could be controlled by said servants and stopped if it became necessary so to do, in order to prevent the said car from entering into and upon the said switch and side track; but the said defendant, wholly regardless of its duty in that behalf and while the said plaintiff was then and there in the exercise of due care and caution for her own safety, then and there so carelessly and negligently drove and operated its said car at a great and dangerous rate of speed, to wit, at the rate of miles per hour, that the said defendant could not control and stop said car when it approached said switch, which said switch was then and there open, and the said car then and there left the main track upon which it had theretofore been running, and ran upon said side track and ran into and against, and then and there struck with great force and violence upon and against a certain other car which was then and there in the possession of the said defendant, and which was then and there being used by the said defendant.

4. And it also then and there became and was the duty of the said defendant to use and exercise great care and caution in the management and operation of its said car by its servants, in that it was then and there the duty of the said defendant by its said servant to look ahead and observe as to whether said switch would be open so as to cause said car to enter into and upon said switch and said side track, or whether said switch would be closed, so that said car would remain upon the said main track and continue to run upon and along said main track upon which said main track said car was then and there being run and operated; but the said defendant, wholly regardless of its duty in that behalf and while the said plaintiff was then and there in the exercise of due care and caution for her own safety, then and there so carelessly and negligently failed to look ahead and to observe the condition of said switch, that said car then and there ran into said switch, which said switch was then and there open, and the said car then and there left the main track upon which it had theretofore been running, and ran upon said side track and ran into

and against and then and there struck with great force and violence upon and against a certain other car which was then and there in the possession of the said defendant, and which was then and there being used by the said defendant.

5. And it also then and there became and was the duty of the said defendant to lock the said switch so that no person, unless duly authorized so to do, could turn the said switch; but the said defendant, wholly regardless of its duty in this behalf, and while the said plaintiff was then and there in the exercise of due care and caution for her own safety, so carelessly and negligently failed to lock the said switch that said switch then and there became and was improperly turned and thrown, so that the car of the said defendant upon which the said plaintiff was then and there a passenger, as aforesaid, ran into said switch and upon said side track at a great and dangerous rate of speed, to wit, at the rate of miles per hour, and then and there with great force and violence ran into and against a certain other car of the said defendant which was then and there standing upon the said side track at the place aforesaid.

6. And it also then and there became and was the duty of the said defendant properly to watch and guard said switch, so that if said switch were improperly turned it could be properly turned before the approach of any of said defendant's cars towards said switch; but the said defendant, wholly regardless of its duty in this behalf, and while the said plaintiff was then and there in the exercise of due care and caution for her own safety, so carelessly and negligently failed properly to watch and guard the said switch that said switch then and there became and was improperly turned and thrown, so that the car of the said defendant upon which the said plaintiff was then and there a passenger, as aforesaid, ran into said switch and upon the said side track at a great and dangerous rate of speed, to wit, at the rate of miles per hour, and then and there with great force and violence ran into and against a certain other car of the said defendant which was then and there standing upon the said side track at the place aforesaid.

By means whereof the said plaintiff was then and there thrown with great force and violence in and about the said car in which she was then and there a passenger, as aforesaid, and said plaintiff was then and there and thereby greatly bruised, crushed, maimed, lacerated, hurt, wounded and otherwise disabled, and otherwise permanently injured, and divers bones of her body were then and there and thereby broken, and divers bones of her body were then and there and thereby wrenched and dislocated, and the nerves, muscles, tendons, sinews, and ligaments of the said plaintiff were thereby then and there severely and permanently injured, and, as a further result of said injuries, said plaintiff has suffered, and is now

suffering, and will continue to suffer, from severe pains and nervous disorders, and has become permanently injured and disordered; and by reason of the premises, the said plaintiff was obliged to and did lay out and expend, and become liable for, divers large sums of money in and about endeavoring to be relieved and cured of her said injuries, and has been hindered and prevented from attending to and transacting her ordinary affairs and business, thereby being deprived of divers large sums of money which she might and otherwise would have earned. To the damage of, etc.²¹⁴

(Virginia)

For this, to wit, that heretofore, to wit, on the day of, 19.., the said defendant was a railroad company and owned and operated a railroad from, Virginia, to, Virginia, and to other points, with its principal office in the city of, Virginia, and that a part of said railroad ran through the county of, Virginia; that the plaintiff's decedent on the day and year aforesaid was a locomotive engineer in the service of said company, and on the day and year aforesaid was the engineer of the engine attached to passenger train No. .. running from to, Virginia.

And thereupon it became and was the duty of the defendant to use ordinary care to provide and maintain a safe track upon which the engine operated by plaintiff's decedent was to run; and to use ordinary care to keep all obstructions off of said track; and to use ordinary care to see that all the switches connecting the said track with side tracks or other tracks in the yard of the defendant at, Virginia, were closed and kept closed ahead of the said engine; and to use ordinary care to provide and keep in proper order and condition safe and suitable switches connecting its main track upon which the engine operated by the plaintiff's decedent was being run, with side tracks and yard tracks and to keep said switches closed; and to use ordinary care to provide and maintain suitable and sufficient targets attached to said switches; and to keep the same so painted as to give timely and sufficient notice to the plaintiff's decedent approaching said switches upon the engine of the defendant that the switch was open so as to enable the said decedent to stop his engine and train in time to avoid an accident; and to use ordinary care to so locate the said switch and target that it might, if open, be seen, far enough ahead of the engine to permit the stopping of the train in time to prevent an accident.

Yet, the said defendant, not regarding its duty in this behalf,

²¹⁴ Elgin, Aurora & Southern
Traction Co. v. Wilson, 217 Ill. 47
(1905).

negligently and carelessly failed to provide and maintain a suitable switch and target at a point which said switch connected its main track with one of its yard tracks on the west end of yard; and negligently failed to so locate the said switch and target, that the same could have been seen by plaintiff's decedent as the engine operated by him was approaching the said switch in time to prevent an accident; and failed to keep said switch closed. And the said defendant carelessly permitted the yard engine to remain upon the said track connected by the switch aforesaid with the track upon which No. .. was running; and permitted the said switch to remain open. And because of, and on account of, said negligence of the defendant the engine attached to No. .. passenger train and which was being operated by plaintiff's decedent without any negligence or want of care on his part, and while said engine was running only a few minutes behind its regular schedule, ran into the said switch, so carelessly and negligently permitted to remain open by the said defendant, and left the main track upon which it was running and ran into one of the yard tracks upon which the yard engine was standing, and with great force and violence ran against and upon the said yard engine.

2. (Consider first count to star as here repeated the same as if set out in words and figures.)

And thereupon it became and was the duty of the said defendant to use ordinary care for the protection of the plaintiff's decedent and to see that he was not injured by reason of the negligence of a co-employee charged with the duty of transmitting orders with reference to the switch on the west end of yard which connected the main track upon which train No. .. was running on the day of the accident with one of the other tracks in said yard.

Yet, the said defendant, not regarding its duty in this behalf, did through one of its employees who was charged with transmitting orders from the division office at, with respect to said switch, negligently, wrongfully and improperly caused and permitted a message to be sent to the employee of the defendant having charge of the switch aforesaid, directing him to keep said switch open for an approaching freight or other train which said employee having charge of said switch did, by reason whereof, and when the plaintiff's decedent was in the faithful discharge of his duty as engineer of the engine attached to train No. .. going east at the time of the accident, and while said engine was running only a few minutes behind its regular schedule, ran into the said switch so carelessly and negligently permitted to remain open by the said defendant, and left the main track upon which it was running, and ran into one of the yard tracks upon which the yard engine was standing, and with great force and violence

ran against and upon the said yard engine, wrecking both engines.

By means whereof the plaintiff's decedent was greatly bruised, mangled and otherwise injured and from which he suffered great and intense mental and physical pain and anguish for the space of about two and a quarter days, when by reason of said injuries so carelessly, negligently and wrongfully committed by the said defendant against the said decedent, he then and there died.

Wherefore, the said plaintiff says that damages have been sustained to the amount of \$....., and that by virtue of the constitution and laws of Virginia, she is entitled to recover the said amount, and therefore she brings suit, etc.

b

For that whereas, before and at the time of the commission of the grievances hereinafter complained of, to wit, on the day of, 19.., to wit, in the county of, Virginia, and within the jurisdiction of this court, the said defendant was the owner, occupier and user of a certain line of railway extending in part from county, Virginia, to, Virginia, a point about miles south of the city of, in the county of Virginia, aforesaid, which line of railway was and is used by the said defendant for the purpose of running thereon and thereover its locomotives, engines and cars, propelled by steam, for the transportation of passengers, freight, material, etc., from point to point, along its said line of railway; that at said point on its said line of railway, to wit,, Virginia, the defendant had established and was maintaining a signal station and telegraph office, and at said point there were certain side tracks and switches owned and used by said defendant for the purpose of shifting and changing cars and engines and turning the same from, and on to the main line of said railway of said defendant at said point; that the said signal station, telegraph office and said tracks and switches, so used as aforesaid, were under the management, control and supervision of one of said defendant's agents, servants and employees; and the plaintiff avers that it was the office and duty of the said agents, employees and servants of the said defendant, so in charge of the said signal station, telegraph office, tracks and switches at said point, to wit,, Virginia, to give all due, proper and correct signals to the locomotive engineers running and operating the engines attached to the trains of the defendant approaching said signal station, and to superintend, guard and have said switches at said point properly thrown, placed and kept in proper position, so as to secure a clear, free and safe track for the engines

and coaches of the defendant passing over and along its main track at said point; and especially so for the train and engine which the plaintiff's intestate, as a locomotive engineer in the discharge of his duty and as an employee of the defendant, was driving and carrying over and along said track at said point at the time of the grievances hereinafter complained of, to wit, on the day of, 19...

And the plaintiff further avers that at the time of the commission of the grievances hereinafter complained of, to wit, on the day of, 19.., the said plaintiff's intestate,, was an employee of the said defendant, as a locomotive engineer on the passenger trains of the defendant running in part between the said points of, in the county of, Virginia, and said, in the county of, Virginia, on the line of defendant's railway; that as such locomotive engineer he was, at the time of the commission of the grievances hereinafter complained of, to wit, on the day of, 19.., running and moving one of the passenger trains and engines of the defendant over the line of defendant's railway between said points; that when he had reached a point on said railway a few miles south of, Virginia, and within a short distance, to wit, about three or four hundred yards from the said signal station of the said defendant at the said point of, Virginia, on the line of the defendant's railway, that in the discharge of his duty as locomotive engineer in charge of and running and operating said engine and train of the defendant, and in obedience to the rule of the said defendant, the plaintiff's intestate, by due and proper signals, notified and advised said station agent of defendant, at its signal station at, of the approach of his said train and engine towards said station, going south, and asked for signals from said station agent as to the condition of the track between his train and engine and said station, and at and beyond said station. And the plaintiff avers that in response to said notice and call for signals the agent of the defendant at said station, in charge of said signal station, switches and tracks at said point, to wit, at its said station at, Virginia, as aforesaid, in disregard of his duty in the premises, carelessly, negligently and recklessly signalled plaintiff's intestate, so in charge of the said train and engine, that the track was safe and clear, and to "proceed" on his way south; that plaintiff's intestate, relying upon said signal thus given him that the track ahead was clear and safe, did "proceed," and propelling forward his engine with the train attached, reached the point on the northern or western track of the defendant, opposite or a little beyond and south

of its said station, where said engine and cars attached ran into a railway switch left open by the carelessness and negligence of the defendant's station agents, servants and employees, whereby said engine, so in charge of plaintiff's intestate, was deflected from its proper track and course, derailed and overturned and the plaintiff's intestate caught under the same, scalded, bruised, mangled and killed.

And so the plaintiff says that by the said wrongful acts, gross carelessness and negligence of the said defendant
....., by and through its agents, servants and employees, or some one or more of them, in this, that by reason of the failure of the said defendant to have said switch at said station duly and properly closed, and by giving to plaintiff's intestate, wrong, erroneous and misleading signal as aforesaid, at the said time and place aforesaid, the said
plaintiff's intestate, came to his death as aforesaid.

And so the plaintiff avers that by reason of the premises as above set forth, an action has accrued to the said plaintiff to have and recover damages of the said defendant
in pursuance of the statute in such cases made and provided, and that she has sustained, is entitled to recover and demands, damages of the defendant to the amount of (\$.....) dollars.

And therefore she brings her suit.

1595 Pile of barrels in packing house, Narr. (Ill.)

For that whereas, on, to wit, the day of
....., 19.., the defendant was possessed of, and operating a certain establishment, commonly called a packing house; that plaintiff then and there was in the employ of said defendant, as a laborer, and as such was working for defendant, with all due care and caution for his own safety, at and near a certain pile of pork barrels, which were piled in rows one upon another to a great height, to wit, feet.

And plaintiff further avers that it then and there became and was the duty of the defendant to keep and maintain said piles of barrels in such condition that they would not spread, tilt, or fall upon plaintiff while working for the defendant at and near the same, and not to do anything with or to said pile of barrels which would cause them to spread, tilt or fall upon the plaintiff while working at or near them in the business of the defendant.

Yet, the defendant, in utter disregard of its duty in this behalf, then and there, carelessly and negligently, kept and maintained said row of barrels, defectively piled in rows one upon another, and while so defectively piled, drove in the head of one of said barrels, and took therefrom the contents thereof, to wit, certain brine and pork, so that the said barrel was then

and there greatly weakened and rendered unable to support the weight of the barrels piled above the same.

And by reason of the carelessness and negligence of defendant, in manner aforesaid, and while plaintiff was in the exercise of all due care for his own safety, the said barrels spread, tilted, gave way and fell upon and against the plaintiff, and thereby plaintiff was thrown and cast to and upon the ground there, with great force and violence; whereby the plaintiff was then and there severely bruised, contused, lacerated and wounded, and the leg of plaintiff was then and there broken; and the plaintiff was then and there otherwise greatly and permanently bruised, wounded and disabled, in so much that he then and there became sick, sore, lame and disordered, and so remained for a long space of time, to wit, from thence, hitherto; during all of which time plaintiff suffered great pain, and was hindered and prevented from transacting and attending to his business and affairs; and by reason also of the premises, plaintiff was forced to and did expend large sums of money, to wit, the sum of dollars in and about endeavoring to be cured of the said wounds and injuries, received in manner aforesaid. Wherefore, etc.

1596 Poisonous food stuffs, Narr. (Ill.)

For that the defendant in the lifetime of the said J and, to wit, on the day of, 19.., at the county of and state of Illinois, were and for a long time previous thereto had been manufacturers and vendors to the public of a certain article of food called and known as , in the name of the E P Co. guaranteed by said defendant to be absolutely pure mince meat and a proper and wholesome article of food, which said defendants knew to be dangerous to human life unless properly made of proper and wholesome material; that previous thereto said defendant had sold and delivered, with other packages of mince meat, to a certain wholesale dealer in meats and provisions, then and there doing business under the name of S & Co., to be resold by them in the regular course of their business, a certain package of said mince meat so manufactured and guaranteed by it and sold and put upon the market by said defendant as a pure and wholesome article of food; that said S & Co. thereafter then and there sold and delivered the said package of mince meat in the regular course of their business as wholesale dealers to one H, a retail dealer in groceries and provisions at in the county of and state of Illinois; that thereafter the said H, then and there at aforesaid, to wit, at county, sold and delivered said package of mince meat in the regular course of his trade and business to one S, at said, for use and consumption in her family, of which the said J was a member.

And that thereupon it became and was the duty of the said defendant then and there to manufacture, compound and put up and sell to the trade for use as food by the public as aforesaid, only such mince meat as was pure and wholesome and not poisonous or destructive to human life when the same should be duly prepared for use and used as food; and to put the same up in such reasonably safe and proper packages that the same should be and continue pure, safe and wholesome as food, and not become poisonous or destructive to human life, while the same should be and remain in the hands of dealers awaiting sale to the consumers for use as food as aforesaid.

Yet, the defendant, not regarding its duty in that behalf, so negligently, carelessly, unskillfully and improperly manufactured and put up for sale and sold and put upon the market for public use as aforesaid the said package of mince meat so sold and delivered as aforesaid by the defendant to said S & Co. and by said S & Co to said H and by said H to said S, and by her duly made into a pie, duly prepared for food for her family of which the said J was a member as aforesaid; that by and through the carelessness and negligence of the said defendant, its servants and employees, in the manufacture and putting upon the market of the said package of mince meat, the same became and was poisonous and destructive to human life.

2. And that it was also then and there the duty of the said defendant to so manage and conduct its business that only pure and wholesome mince meat should be so manufactured by and put up and put upon the market by it for sale to and use by the public, as aforesaid, and to put the same up in such packages or in a manner suitable to keep and preserve such mince meat in a pure and wholesome condition as food for whomsoever should become a purchaser thereof and use the same.

Yet, the defendant, not regarding its duty in this behalf, so carelessly, negligently, unskillfully and improperly conducted its said business in the making and putting up for sale of the said mince meat that by and through the carelessness, negligence and unskillfulness and default of itself and its servants in the selection of the material and in the manufacture of said package of mince meat and in the enveloping and putting the same up for sale and use as food as aforesaid, the same then and there became and was unfit for food and unwholesome, and a deadly poison and destructive to human life, which the defendant, its servants and employees, well knew, or by the exercise of reasonable care and caution in the preparation thereof might have known, to be poison and destructive to human life.

3. And it was also then and there the duty of said defendant to manufacture and sell to the trade for public use as aforesaid only such mince meat as was pure and wholesome and not injurious to life and health of individuals or poisonous when duly prepared for and used as food by those to whom it should come in due course of trade for use and consumption; and also put the same up and envelope the said mince meat in such suitable covers and in such manner as to prevent and keep the same from becoming unwholesome and poisonous and destructive to human life in course of transmission from the said manufacturer to the said consumer in the due and usual course of trade.

Nevertheless, the defendant, not regarding its duty in this behalf, so carelessly, negligently, unskillfully and improperly conducted its business in the making and compounding of said mince meat and putting the same up for sale that by and through the carelessness, negligence, unskillfulness and default of the defendant, its servants and employees in the selection of material, the manufacture of said mince meat and in the manner of enveloping the same in packages for sale to the trade and to the public, a certain package of said mince meat so manufactured and put up and sold by the defendant as aforesaid, was so carelessly, negligently and improperly made and compounded and was so defectively put up and enveloped for sale to the trade and to the public that the same then and there became and was, and was well known to the defendant, or by the exercise of reasonable care and caution in the manufacture thereof might have been known to the defendant, its servants and employees, to be unwholesome, poisonous and destructive to human life.

And that said package, having come into the hands of one H in the usual course of his trade as retail dealer in groceries and provisions at in the county of and state of Illinois, was by him sold in the usual course of his trade to one S of the same place for consumption and use as food in her family; that said J, testator of the plaintiff, was then and there a member of the family of the said S; that said S then and there duly made said package of mince meat or part of the same into a pie, whereof the said J, as a member of her family, without negligence on his part, did eat as he lawfully might, believing said pie to be fit and wholesome for food, and was then and there poisoned and made sick and died in consequence thereof at

And plaintiff avers that she was the wife of the said J, her testator as aforesaid, and so continued to be until the time of his death; and that the said J, on the day aforesaid, and for a long time previous thereto, was a contractor and builder and derived from his said business and employment a yearly income of, to wit, dollars; and by means thereof was enabled to and did provide a comfortable and liberal maintenance for himself as well as for the plaintiff, his wife; and

that by the death of the said J as aforesaid, so by the defendant caused as aforesaid, plaintiff is injured in her means of support and is deprived of the same, and is compelled to support herself by her own exertions.

And plaintiff further avers that it is provided in section of chapter of the general statutes of the state of, enacted in the year, 19.., and in section of chapter of General Statutes of, compiled in the year, 19.., and now in full force and effect, that "when the death of one is caused by the wrongful act or omission of another, the personal representatives of the former may maintain an action therefor against the latter if the former might have maintained an action against the latter for an injury for the same act or omission. And that the damages cannot exceed ten thousand dollars and must inure to the exclusive benefit of the widow and children, if any, or next of kin, to be distributed in the same manner as personal property of the deceased." Wherefore, etc.

1597 Premises unsafe, action

The owner or occupant of land is liable to persons who are invited through independent contractors to go upon the premises and injury results from its unsafe condition, if such condition is known to the owner or occupant and is not known to the person injured.²¹⁵

1598 Protecting property from another's negligence, action

An action for damages is maintainable against a person or corporation whose negligence causes injury to or death of another person while attempting to save or protect his property from such negligence and the effort to save it is such as an ordinary prudent person would make under the particular circumstances.²¹⁶

1599 Pulley bursting, machinist injured, Narr. (W. Va.)

And thereupon the said plaintiff says that said defendant was then and there, at and before the time of the committing of the grievances hereinafter mentioned, to wit, on the day of, 19.., the owner, operator and proprietor of a certain large mill or foundry located in said county of and state of West Virginia, and, being such owner, operator and proprietor, was then and there engaged

²¹⁵ Calvert v. Springfield Electric Light & Power Co., 231 Ill. 290, 293 (1907).

²¹⁶ Illinois Central R. Co. v. Siler, 229 Ill. 396. For Narr., see Section 1550.

in manufacturing, milling and finishing iron molds and castings. The plaintiff avers that, in said mill or foundry as aforesaid, there was then and there a certain large gas engine and two other gas engines of smaller size and a generator on each side of said gas engines, which said gas engines and generator were then and there used for the purpose of generating and were generating electricity of great power and force, which said electricity was then and there transmitted by wires to a horsepower electric motor located on top of a certain machine known as an "end milling machine" used for the purpose of milling and finishing the ends of castings. The said gas engine and generator, being used to generate electricity as aforesaid and the said electricity being so generated and transmitted as aforesaid, were then and there used to move and work, and were moving and working said electric motor as aforesaid. And the said electric motor in turn was then and there used to move and work and was moving and working machinery, mill gearing, shaftings, belting and pulleys, and said mill gearing, shafting, belting and pulleys were then and there used to move and work and were moving and working said "end milling machine," used as aforesaid.

The plaintiff further avers that the said company, being such owner, operator and proprietor of said mill or foundry in said county and state aforesaid, and being so engaged as aforesaid, then and there employed said plaintiff for hire and wages to take charge of, run and operate the said "end milling machine" described and used as aforesaid; and that it then and there became and was the duty of said defendant to use proper care and caution, that the plaintiff should be provided with good, proper, safe and suitable machines and appliances and especially to provide good, safe, proper and suitable belting and pulleys to be used by him in said employment as aforesaid, and that the said plaintiff should be secure and safe in all respects in his employment from any injury or accidents incident thereto, against which ordinary care and caution could avail, while so engaged by and for said defendant in said work; yet, the said defendant not regarding its duty in that behalf did not use proper care and caution that said plaintiff should be provided with good, proper, safe and suitable machines, appliances, belting and pulleys to be used by him in said employment as aforesaid; and that said plaintiff should be secure and safe in all respects in his employment against which ordinary care and caution could avail, while so engaged by and for said defendant in said work from or against any injury or accident incident thereto; but, wholly neglecting its duty in that behalf and to the contrary, said defendant provided for and suffered to be used by said plaintiff, in and while engaged in operating said "end milling machine" for the purpose and use of milling and finishing

ends of castings, along with the pulleys aforesaid, a certain cracked, insecure, weak, unsafe and unsuitable pulley, and a certain unsafe and unsuitable belting located at the lower left corner of the central portion of said "end milling machine;" all of which was to the plaintiff unknown.

And the last mentioned pulley, because of its being cracked and because of its insecurity, weakness, unsafeness and unsuitability, of said last mentioned belting, all of which was to the plaintiff unknown as aforesaid, and while it was then and there being used as aforesaid, and while the said plaintiff was then and there using the said "end milling machine," for the purpose and use aforesaid, to wit, for milling and finishing ends of castings as aforesaid, broke and parted and a portion thereof struck the plaintiff on the head with great force and violence, whereby said plaintiff then and there became and was dazed and was then and there thrown down and one of his arms, to wit, the right arm, was caught in said last mentioned and described pulley and belting aforesaid and was torn and cut off about two inches below the elbow, that the elbow joint was so badly crushed by said last mentioned pulley and the belting aforesaid, that it then and there became and was necessary for the surgeon in attendance to amputate the said right arm above the elbow; and the plaintiff was otherwise badly bruised, hurt and injured, and so remained for a long space of time, to wit, from thence hitherto, during all which time the plaintiff suffered and underwent great pain and anguish of body and mind and was thereby prevented from attending to and following his usual avocation, to wit, that of a machinist, and from earning large sums of money from said avocation, which but for said injury he would have earned and received; and by means of the premises, said plaintiff became permanently injured and crippled, and will so remain during the rest of his natural life.

Wherefore, said plaintiff says that he has been injured and has suffered damages by reason of the negligence of said defendant in the sum of (\$.....) dollars, and therefore he brings this suit.

1600 Railroad crossing, gate ordinance, action

It is the duty of railroad companies to take notice of properly passed ordinances for the construction of gates at railroad crossings.²¹⁷

1601 Railroad crossing, Narr. (Fla.)

For that whereas the defendant in said was on the day of the owner of and did on

²¹⁷ Rosenthal v. Chicago & Alton R. Co., 255 Ill. 552, 558 (1912); Cl. 27, par. 62 (Sec. 1, art. 5), Cities and Villages act (Ill.).

said date own and conduct and operate a railroad business in said county of and state of Florida by then and there running engines and cars on its said railroad track in said county and state, which said railroad track extended through the city of in the county of and state of Florida, and was operating and conducting the same subject to all the rules and regulations, restrictions, liabilities and provisions of law applicable to railroads doing business under the laws of the state of Florida; that on the day of, 19.., the plaintiff had occasion to walk a short distance on the railroad track of the defendant at a point about yards west of station in county, Florida, and about yards east of where one of the public streets of said crosses the said track of the defendant, the same being then and there used as a public crossing of said in the usual course of foot travel, as had been and was then the custom, then and there and before and since to be used as a public thoroughfare by the citizens of said city with the knowledge and consent of the said defendant then and there and since then and for several years previous to said date with the knowledge and consent of said defendant; and while the plaintiff was then and there using due caution as a reasonable and prudent man without any negligence on his part, the defendant then and there by its agents, servants and employees ran one of its trains at a great and unlawful rate of speed without giving any warning of approach of same by ringing a bell or blowing a whistle, and carelessly and negligently and wantonly ran said train unlawfully as aforesaid along the track of said defendant as aforesaid, and struck the said plaintiff violently and then and there ran up to, against and over plaintiff and thereby then and there ran over and crushed and mashed off both of plaintiff's legs, and thereby rendering the plaintiff wholly incapable of earning a livelihood for himself, and thereby causing the plaintiff great pain and suffering and agony and permanent injury to the plaintiff.

And the plaintiff further charges that before and up to the time of the injury aforesaid he was a strong and healthy man of years, was earning wages at the rate of to per day and was receiving that amount per day when the aforesaid injury occurred; and that plaintiff is an uneducated man and unable to earn a living for himself except by manual labor; and that he is now wholly without means of earning a living for himself on account of the injury aforesaid; which injury was then and there caused by the carelessness and negligent way in which defendant by its agents, servants and employees were then and there running said train; that the said train was then and there running at a great and unlawful rate of speed and without ringing a bell

or blowing a whistle, and that the same was along a public much traveled thoroughfare in said and within yards of a public street crossing of said in a thickly populated section of said; and that the negligent, careless and unlawful way in which said defendant by its agents, servants and employees were then and there running said train at the time the said injury aforesaid occurred was without regard to public safety and was without regard to the plaintiff and his rights as a citizen; and that because of carelessly and negligently injuring of plaintiff as aforesaid by then and there striking him and running over him and cutting and mashing off both of plaintiff's legs as aforesaid with defendant's train as aforesaid, and thereby permanently injuring plaintiff as aforesaid, the plaintiff is thereby deprived of any means of making and earning a living for himself; and plaintiff has also suffered other internal injuries and has otherwise suffered great pain and agony by reason of the injury aforesaid; therefore, plaintiff claims damages in the sum of dollars.

2. And for a second count the plaintiff avers each and every allegation of the first count and further avers that the striking, the wounding, the crushing and the mashing off the legs of plaintiff by defendant's train as aforesaid was caused by the gross carelessness of defendant's agents, servants and employees in running said train at a great and unlawful rate of speed, to wit, miles per hour contrary to the laws of the state of Florida, being less than miles of said depot aforesaid, and within yards of a street crossing of said aforesaid, and the negligence of the defendant's agents, servants and employees in not seeing the plaintiff as aforesaid as the plaintiff was then and there in full view of the said train, and also by said agents, servants and employees of the defendant failing to ring the bell and blow a whistle and give plaintiff warning in time for him to get off the said track and thereby avoid the injury aforesaid; and that the running of said train near the depot aforesaid in a thickly populated section of said aforesaid at and near and across one of the public street crossings in said as aforesaid at such a rate of speed as aforesaid in the corporate limits of said was gross negligence on the part of the defendant; therefore plaintiff claims damages in the sum of dollars.

3. And for a third count the plaintiff avers each and every, the allegations of the first and second counts and further avers that plaintiff had the right under the circumstances then and there existing and the conditions then and there existing to expect and believe that the defendant by its agents, servants and employees aforesaid would operate its trains at a rate of

speed required by law at the place where plaintiff was then and there at, and that he would be warned of the approach of said train by the blowing of a whistle and the ringing of a bell as required by law of trains running through incorporated towns and cities and across public street crossings; and that if such had been the case plaintiff then and there could have and would have gotten off the track in time to have prevented the said injury to happen as aforesaid; but that the defendant as aforesaid did not give warning as aforesaid of the approach of the train as aforesaid, nor did it so operate its trains at a rate of speed required by law under the circumstances then and there that would insure the safety of plaintiff and other persons that might be passing then and there, or who might be walking along said street crossing; and the failure of said defendant by its agents, servants and employees aforesaid to so operate its train at a rate of speed then and there as required by law and to give warning of its approach then and there as required by law, caused the said injury aforesaid to plaintiff; and that the same was gross negligence on the part of the defendant's agents, servants and employees aforesaid in so operating said train; and therefore plaintiff claims damages in the sum of dollars, and brings this suit.

.....

(Illinois)

For that whereas, on, to wit, the day of
, 19.., the said, during his life time, was
 then and there rightfully walking on a certain public highway
 in the city of, in the county of and
 state of Illinois, known and called street, at a cross-
 ing of said public highway and a certain railroad crossing of
 the defendant in the county of aforesaid, using
 all due diligence and care in that regard.

And the defendant was then and there possessed of a cer-
 tain locomotive engine and cars thereto attached, commonly
 known as a passenger train, which were then and there under
 the care and management of divers then servants of the defend-
 ant, who were then and there at the place aforesaid required
 to run said locomotive engine and cars thereto attached at a
 proper rate of speed. But plaintiff avers that said locomotive
 engine and cars thereto attached were negligently and improper-
 ly, carelessly and unskillfully propelled, run, driven and
 operated at a greater rate of speed than miles per
 hour, and therein the defendant wholly failed and made de-
 fault, contrary to section of the code of the city of
, state of Illinois, which recites among other things
 that "No railroad corporation shall, by itself or employees,
 run any passenger train upon or along any railroad track
 within the corporate limits of the city of;
 at a greater rate of speed than miles per hour."

2. And so being such owner of and using and operating said railroad, as aforesaid, the defendant then and there negligently and carelessly drove a certain locomotive engine and cars thereto attached upon and along said railroad up to and across the said public highway at the crossing of the same and the said railroad, and in so doing the defendant failed and neglected to ring the bell or blow the whistle which were attached to said locomotive engine, as it was required to do by section 6 of chapter 114 of the Revised Statutes of Illinois of 1874, which was in full force and effect at that time, to wit, on the day of, 19.., and which recites as follows: "Every railroad corporation shall cause a bell of at least thirty pounds of weight and a steam whistle placed and kept on each locomotive engine, and shall cause the same to be rung or whistled by the engineer or fireman at the distance of at least eighty rods from the place where the said railroad crosses or intersects any public highway, and shall be kept ringing or whistling until such highway is reached." But plaintiff avers that neither the bell was rung nor the whistle blown at the distance of at least eighty rods from the said public highway, nor was the bell rung or the whistle blown at the distance of eighty rods from the said public highway and kept ringing or whistling until such public highway was reached by said locomotive engine, and that neither the bell was ringing of said locomotive engine nor the whistle blowing when said locomotive engine and cars thereto attached approached the crossing aforesaid; but therein the defendant wholly failed and made default contrary to the provisions of the statute in such case made and provided and above recited.

3. And so being such owner as aforesaid, and using and operating said railroad aforesaid, the defendant drove a certain locomotive engine and cars thereto attached upon and along said railroad up to and across the crossing where the said was passing the tracks as aforesaid, and in so doing the defendant then and there failed and neglected to ring the bell as by section of the municipal code of the city of and state aforesaid, it was required to do, and which section was in full force and effect at that time, to wit, the day of, 19.., and which recites as follows: "The bell of each locomotive engine shall be rung continually while running within said city except locomotives running upon railroad tracks situated east of avenue on the shore of, between station and of said city, when no bell shall be rung or whistle blown except as signals of danger." But plaintiff avers that said place where said crossed the tracks of the as aforesaid, was not east of avenue on the shore of between and, and that the bell

of said locomotive engine was not ringing continually while running within said city as aforesaid, and was not ringing when said locomotive engine and cars thereto attached approached the crossing aforesaid; but therein the defendant wholly failed and made default contrary to the provisions of the section above recited.

4. And so being such owner as aforesaid, the defendant then and there at the said crossing aforesaid had its gateman stationed and placed whose duty it was to lower the gates maintained at said crossing by the said defendant when any train was about to cross the said crossing upon the tracks of the said defendant, and the said gateman wholly failed and neglected to lower the gates at said crossing as the said was about to cross the tracks of the defendant, and therein the defendant wholly failed and made default.

5. And so being such owner as aforesaid, and using and operating said locomotive engine and cars thereto attached as aforesaid, the defendant then and there at said crossing had a flagman improperly stationed and placed, whose duty it was to signal persons traveling in the direction of said crossing, and warn them of the approach of any locomotive engine or any impending danger. But plaintiff avers that no signal was given to said by the flagman thus improperly and negligently stationed and placed at said crossing, of the approach of the said locomotive engine and cars thereto attached; but therein the defendant wholly failed and made default.

6. And so being such owner as aforesaid and using and operating said locomotive engine and cars thereto attached as aforesaid, while the said was then and there with all due care and diligence walking upon said public highway at said crossing, it became and was the duty then and there of the defendant to place upon said locomotive engine a fireman who was reasonably skilled in that behalf, whose duty it was in operating said locomotive engine over and upon its tracks at and near the point aforesaid to look ahead and give notice or warning to persons whose duty it was to cross the tracks as aforesaid, and to be about and upon the same when said fireman was aware of persons being upon said tracks or when by the exercise of reasonable diligence he could have seen persons upon said track. Yet, the said defendant in utter disregard of its duty in that behalf then and there negligently and carelessly placed upon said locomotive engine a fireman who was incompetent and unskillful and who possessed a defective eyesight, to wit, one of his eyes being entirely gone, and the said fireman then and there negligently and carelessly and by

reason of such defective eyesight wholly failed to observe or see the said deceased who was approaching the track from the same side that the said fireman was stationed upon said engine, and warn the said deceased of the approach of said locomotive engine.

7. And being such owner of and using and operating, as aforesaid, the said locomotive engine and cars thereto attached, the said locomotive engine and cars thereto attached, as aforesaid, while the said, deceased, was then and there with all due care and diligence on his part, walking upon said public highway at said crossing aforesaid, the defendant then and there by its servants so carelessly and improperly drove and managed its said locomotive engine and cars thereto attached by running the same at a high rate of speed and by failing to keep a proper watch for persons about to pass over said crossing, or to give such signals as would apprise such persons using due care and diligence of the approach of the said locomotive engine and the cars thereto attached, and by failing and neglecting to stop or endeavor to stop said locomotive engine and cars thereto attached so as to prevent injury to the said upon said crossing.

By means and in consequence of which default and neglect of the defendant, as aforesaid, the said locomotive engine and cars thereto attached then and there struck with great force and violence upon and against the said who was then and there thrown with great force and violence to and upon the ground there, and was then and thereby greatly bruised, torn, hurt, wounded, mangled in his limbs and divers bones of his body were broken and injured, whereby and wherefrom he died on the day of, 19.., in the county aforesaid. (Add last two paragraphs of Section 1495)

b

For that whereas on, to wit, the day of, 19.., in the town of, in said county, the plaintiff was walking along and upon a certain public highway known as in said town of at the intersection of said with another public highway there known as in said town of in said county of; and whereas the defendant was then and there operating a certain railroad upon and along the said public highway known as, in the town of aforesaid, and was then and there operating a certain locomotive engine with a certain train of cars then attached thereto, which said locomotive engine and train were then and there

under the control, care and management of divers then servants of the defendant, who were then and there driving the same upon and along the said railroad near and towards the crossing of said and aforesaid, and while the plaintiff, with all due care and diligence was then and there walking across the said railroad at the said crossing upon the said public highway there, the defendant then and there, by its servants, so carelessly and improperly drove and managed the said locomotive engine and train, that by and through the negligence and improper conduct of the defendant by its said servants in that behalf, the said locomotive engine and train then and there ran and struck with great force and violence upon and against the said plaintiff and thereby the plaintiff was then and there thrown with great force and violence to and upon the ground there and was thereby then and there injured as hereinafter alleged.

2. And for that also whereas at the time of the committing of the grievances hereinafter stated, there was in force in the town of in said county, an ordinance in words following, to wit:

“No railroad corporation shall by itself, agents or employees run any passenger train upon or along any railroad track within the corporate limits of the town of at a greater rate of speed than ten miles per hour, nor shall any such corporation, by itself, agents or employees, run any freight car or cars upon or along any railroad track within said town at a greater rate of speed than six miles per hour.”

Yet, the defendant, on the day of, at the said town of in the county aforesaid, was possessed of, using and operating a certain railroad track crossing a certain public street there known as in the said town of, and wholly disregarding said ordinance, and in violation thereof, on said day of, at the said town of, in the county aforesaid ran a certain freight train upon and along a certain railroad track within the corporate limits of said town of, to wit, at the crossing of said and at a greater rate of speed than miles an hour, in consequence of which a certain locomotive engine drawing a certain freight train run by the defendant, ran against and struck the plaintiff, who was then and there, with all due care and diligence walking along and upon said across said railroad track at said crossing, and thereby the plaintiff was then and there with great force and violence thrown to and upon the ground there, and was thereby then and there injured as hereinafter alleged.

3. And for that whereas also the defendant, on the day of in the town of, in the

county aforesaid, was possessed of and used and operated a certain railroad extending through a part of the county aforesaid, which said railroad crossed a certain public highway there, to wit,, in said town of, in the county aforesaid, at a certain place in the said public highway where the same is intersected by another highway there known as in said town of, in said county of, and so being the possessor of and using and operating the said railroad as aforesaid, the defendant then and there drove a certain locomotive engine upon and along the said railroad up to, upon and across the said public highway known as at the said crossing of the same and the said railroad, and in so doing no bell of at least thirty pounds weight or steam whistle placed on the said locomotive engine was rung or whistled by the engineer or fireman thereof at the distance of at least eighty rods from the said crossing and kept ringing or whistling until the said crossing was reached by the said locomotive engine; but therein the defendant wholly failed and made default contrary to the form of the statute in such case made and provided; by means and in consequence of which default and neglect of the defendant as aforesaid, the said locomotive engine then and there ran and struck with great force and violence upon and against the plaintiff, who was, then and there, with all due care and diligence, walking along and upon the said public highway known as aforesaid at the said crossing, and thereby the plaintiff was then and there with great force and violence thrown to and upon the ground there and was thereby then and there greatly bruised, hurt and wounded and divers bones of h.. body were then and there broken and ..he was thereby greatly shocked and h.. nerves wholly shattered and h.. brain injured and ..he became and was sick, sore, lame and disordered and was otherwise greatly injured and so remained for a long space of time, to wit, from thence hitherto; during all which time ..he, the plaintiff, suffered great pain and was unable to sleep and was prevented and hindered from attending to and transacting h.. affairs and business, and by means of the premises the plaintiff was forced to and did then and there lay out divers sums of money, to wit, dollars, in and about endeavoring to be cured of h.. said disorders, wounds and hurts occasioned as aforesaid; and plaintiff avers, that by reason of the injury so received as aforesaid, ..he was and is now, permanently injured. Wherefore, etc.

c

For that whereas, the plaintiff, on the day of
, 19.., was riding in a certain buggy drawn by a certain horse upon and along a certain public highway there, to wit, street, at a certain crossing of the said

street and a certain railroad of the defendant, in the city of, county and state aforesaid; and the defendant was then and there possessed of a certain locomotive engine with certain passenger cars attached thereto, which said locomotive engine and cars were then and there under the care and management of divers then servants of the defendant who were then and there driving the same upon and along the said railroad and near and towards the crossing aforesaid.

And thereupon it became and was the duty of the defendant to ring the bell and blow the whistle of said locomotive engine as it was required to do by section 6 of chapter 114 of the Revised Statutes of Illinois, which said section was in full force and effect at that time, to wit, the day of, 19., and which reads as follows: (Insert said section).

Yet the defendant not regarding its duty in the premises aforesaid, and contrary to the provisions of the statute in such case made and provided wholly failed and neglected to ring the bell of the said locomotive engine or blow the whistle at the distance of at least rods from the crossing, and the said public highway.

2. And also, thereupon, it became and was the duty of the defendant's gateman stationed and placed there to lower the gates maintained at said crossing by the said defendant when any engine or train was about to cross the said crossing upon the tracks of the said defendant, and to apprise travelers and persons then and there rightfully walking or driving upon the said highway when it should be safe to cross the tracks of the defendant at the point aforesaid; but plaintiff avers that the said gateman carelessly and improperly and negligently failed to lower the gates at the said crossing where the said was about to cross the tracks of the defendant; and further that the said gateman carelessly and improperly raised the gates (which had been lowered at the time plaintiff drove up to the crossing aforesaid to permit several freight trains to pass by) and signaled the plaintiff to cross the tracks aforesaid.

By means and in consequence of which default and neglect on the part of the said defendant, said locomotive engine and cars then and there struck with great force and violence upon and against the buggy of the plaintiff in which he was then and there riding with all due care and diligence, upon said public highway, aforesaid, and thereby the plaintiff was then and there thrown with great force and violence from and out of the said buggy to and upon the ground there, and was thereby then and there greatly bruised, hurt and wounded, divers bones of his body were and there broken, and he became and was sick, sore, lame, and disordered, and so remained for a long space of time, to wit, from thence hitherto; and as a

further result of the injuries, so occasioned, as aforesaid, the left shoulder of the plaintiff was dislocated and his shoulder blade badly bruised and ruptured, his legs were bruised and he was injured internally, his lungs and heart sustained serious injuries, from the result of which serious and permanent injuries, plaintiff has suffered from constant headaches, pains in the back, and does now suffer from constant headaches and pains in the back, and will hereafter suffer from headaches and pains in the back; and as a further result of the injuries so occasioned, as aforesaid, the plaintiff suffered severe and excruciating bodily injury and great mental torture and physical anguish and pain, and will hereafter suffer severe and excruciating bodily injury and great mental torture and physical anguish and pain; and by means of the premises plaintiff has been hindered and prevented from attending to and transacting his affairs and business, and will hereafter be hindered and prevented from attending to and transacting his affairs and business; and plaintiff is now and will hereafter be deprived of large gains and profits, which he might and otherwise would have acquired; and plaintiff was forced to and did then and there lay out divers sums of money, amounting to about dollars in and about endeavoring to be cured of his said wounds, hurts, and bruises, occasioned as aforesaid; and also by the running and striking of the said locomotive upon and against the said buggy, aforesaid, at the time and place aforesaid, the said buggy then of the value of dollars, and a certain set of harness by means of which the said buggy was then and there attached to said horse then and there of the value of dollars, and whereof the plaintiff was then and there lawfully possessed, was crushed and destroyed, and then and there became and was of no use or value to the plaintiff; and the said horse which the plaintiff then and there owned, which was then and there of the value of dollars, was injured badly in the legs, and has become of no use or value to the plaintiff. Wherefore, etc.

d

For that whereas, the defendant, the, a corporation, on, to wit, the day of was possessed of and using and operating a certain railroad extending through a part of the county of and was also then and there possessed of a certain locomotive engine and train of cars attached thereto, which said locomotive engine and train of cars were then and there under the care and management of divers then servants of the said defendant; that the defendants, corporations, were then and there possessed of and using and operating a certain line of street railway in the city of, county of and state of Illinois, extending upon and along a certain public highway of said city, county and state aforesaid, known as

..... with certain electric cars running and going thereon for the conveyance of passengers for a certain reward to the said defendants in that behalf paid; that on said date plaintiff became and was a passenger on one of said electric cars then and there going on said railway in an easterly direction for a certain reward in that behalf paid.

Plaintiff further avers that it then and there became and was the duty of the said defendants, the, to exercise reasonable care for his safety; but wholly neglecting their duty in this behalf and while plaintiff was then and there upon said electric car in the exercise of all due and reasonable care for his own safety, the said defendants through their servants then and there in charge of said electric car and said locomotive engine and train of cars, then and there so negligently, improperly and carelessly managed, controlled and operated said electric car and said locomotive engine and train of cars and each of them, that they collided at the intersection of said railroad and; and thereby plaintiff was then and there thrown with great force and violence from and out of said electric car to, upon and against the ground, pavement, and divers other objects there; by means whereof he was seriously injured in and about the body, head and limbs, both internally and externally, and divers of the bones of his body were then and there broken, and the muscles and ligaments of his body were then and there torn, bruised, and lacerated, and he did then and there receive a great nervous shock from which he will never fully recover; by means whereof he became and was sick, sore, lame and disordered and so remained for a long time, to wit, from thence hitherto, and in the future will so permanently remain; during all of which time he has suffered and will suffer great pain and inconvenience both of body and mind on account of said injuries; and by means of the premises he has been hindered and prevented from thence hitherto and in the future will permanently be hindered from transacting his affairs and business; and also by means of the premises it became necessary and he did expend large sums of money in and about endeavoring to be cured of his said injuries, sickness and disorders occasioned as aforesaid, and it will be permanently necessary to expend large sums of money for said purpose in the future. To the damage, etc.

e

For that whereas, the said defendant, on or about the day of, 19.., owned and operated a certain street railway for the conveyance of passengers for hire, through certain portions of the city of, and through and along a certain street called avenue there in said city; that the said was on or about the date aforesaid a passenger on the car of the defendant going north on said street; that there also was a certain steam rail-

way crossing at the intersection of said street and street in said city; that it thereupon became and was the duty of the defendant when approaching said crossing to exercise all due and proper care to ascertain and to know that no railway trains were approaching that were apt to run into said street car at said crossing; but that in this the defendant wholly neglected and defaulted and carelessly and negligently, and while said was in the exercise of due care for her own safety, ran said street car in which the said was riding, through the gates which were lowered, breaking and smashing said gates, and ran said street car on to the steam car tracks where the said street car was struck by an approaching train and thrown from the tracks; by means whereof the said was knocked down from said street car and her body and head were bruised, hurt and injured, internally and externally, and she became sick and sore and disabled and so remained for a long space of time, to wit, from thence hitherto, and that the said is permanently injured and disabled in mind and body, and became liable to pay out divers large sums of money in and about curing herself, to wit, the sum of (\$.....) dollars; to the damage, etc.²¹⁸

(Maryland)

For that the defendant possesses and operates a railroad with engines and cars thereon in said county and state of Maryland; that at the town of, in said county and state, near the passenger station of the defendant, the tracks of said defendant's railroad cross the public road at grade; that the defendant (by its servants) so negligently and unskillfully managed said railroad and the engines and cars thereon, in and about said grade crossing, that a certain , a daughter of the equitable plaintiff of the age of years, while using said public road in crossing the tracks of said railroad at said grade crossing and while exercising due care, was, on, 19.., struck by an engine and cars of the defendant; whereby the said was thrown down and injured and, in consequence of said injuries, then and there died; and that the equitable plaintiff was, by the negligence of the defendant, deprived of and has lost the service of the said, to which he was entitled, and has suffered great mental pain and suffering as the result of the said negligence of the defendant; whereupon, the plaintiff brings this suit and claims dollars damages therefor.

²¹⁸ Casey v. Chicago City Ry. Co.,
237 Ill. 140 (1908).

(Michigan)

For that whereas, heretofore, on, to wit, the day of, 19.., and for a long time prior and subsequent to said date, the said defendant was possessed of, maintained and operated a certain railroad passing through said county of state aforesaid, from the city of in said state, to the city of in the state of , which said railroad is double-tracked, and intersects and crosses a certain public street or highway known as avenue, in the city of in said county, said street passing through said city in a northerly and southerly direction, and said railroad approaching and crossing the same in, to wit, a northeasterly and southwesterly course, and which said street, before and at the time of committing the grievances by said defendant, hereinafter mentioned and set forth, and from thence hitherto was and still is a common and public highway for all persons to go, return, pass and re-pass in and upon, by and with carriages, wagons and other vehicles, also upon foot, at their free will and pleasure, to wit, at the city of in said county, and over and along which said public street the people of said city of, county of and state of Michigan, were in great numbers frequently passing and re-passing, as well on foot as in carriages, wagons and other vehicles, at their free will and pleasure as foresaid.

And the said plaintiff avers that by reason of, to wit, buildings, trees, bushes, various poles and other obstructions, together with an embankment caused by a deep cut in grading for said railroad, along and adjacent to the tracks and right of way of said defendant, on the westerly side thereof and east of said public street, the locomotives and trains of cars of said defendant on approaching said crossing from the east upon said railroad tracks could be seen but a short distance by persons approaching said crossing from the north along and upon said public street or highway; that, to wit, feet southwesterly along the northerly main track of said defendant's railroad from its intersection with the wagon or carriageway upon said public street, said track did then and there, and still does, intersect and cross the main track of the railroad, a railroad then and still maintained and operated by the railroad company, a corporation between the city of and the city of in said state of Michigan; that, to wit, (..) feet southwesterly from said street crossing and, to wit, (..) feet northeasterly from said railroad crossing with the railroad track, on said defendant's right of way and on the northwesterly side of defendant's said tracks, was then and still is maintained a post, with board attached thereto inscribed with the word "Stop!" facing along said defendant's

track to the northeast as a warning to all trains running to the southwest over its said track to be stopped before passing said "Stop board" or attempting to pass over the said railroad track at said railroad crossing; that, to wit, (..) feet northeasterly from said public street crossing was, at the time aforesaid, for a long time prior thereto, and from thence hitherto, maintained and kept on the northerly side of defendant's said track a certain post, with board attached inscribed with the words, "Reduce speed to miles per hour," facing to the northeast along said track, as a regulation and warning for all locomotives and trains of cars running to the southwest over defendant's said road to reduce speed not exceeding (..) miles per hour before passing over any of the streets of the said city of and not to run any of its locomotives or trains of cars at a greater speed than, to wit, (..) miles per hour over or across any of such streets; and that at the time and place aforesaid, on, to wit, the day of, and at the city of in said county, the said defendant being then and there possessed of and operating and controlling its said railroad, passing through said county of and city of intersecting and crossing said street thereof known as avenue as aforesaid, and over and across which street crossing aforesaid its locomotives and trains of cars propelled by steam locomotives were being continuously and at frequent intervals run and propelled, it then and there became and was the duty of the said defendant to use and employ reasonable care, caution and diligence in running and propelling its said steam locomotives and trains of cars over and along its said railroad, in approaching and over and across said public street of said city of known as avenue, at the crossing aforesaid, so as not to injure the said plaintiff or any other persons lawfully traveling over said street crossing; to give due notice and warning of the approach of any such trains of cars or steam locomotives to all persons lawfully traveling along said public street toward and over said street crossing, by sharply sounding the whistle upon any and all such locomotives at least (.....) rods before reaching said street crossing, and after sounding the whistle to continuously ring the bells upon any and all such locomotives until such crossing should be passed; to run such locomotives and trains of cars over such street crossing at a moderate speed not exceeding, to wit, (....) miles per hour; to have and maintain such proper lookout from and control over its said locomotives and trains of cars as to make the stops required by law and prevent injury to any person or persons lawfully passing over or attempting to pass over said street crossing; to use, apply and employ all reasonable necessary means, precautions and care within its

power to stop its trains, or to otherwise avoid injury to the plaintiff or any other person or persons known to it to be in danger of injury while passing or attempting to pass over said street crossing aforesaid; and not to violate its own rules and regulations for running its locomotives and trains of cars over such crossing, nor the provisions of the ordinance of said city of, then and still in full force and effect, therein regulating the speed of railroad trains while passing over the streets and avenues of said city, the same being an ordinance entitled "An Ordinance relative," etc., duly passed by the common council of said city of on the day of, and still remaining in force as aforesaid.

And the said plaintiff further avers that, on, to wit, the said day of, 19.., at about the hour of o'clock in the of said day, at the city of in said county, he, the said plaintiff, together with his wife, were traveling over and along said public street known as avenue, in the city of aforesaid, from the north and going south to and toward said crossing of defendant's main tracks of its railroad, upon and over said street, then and there riding in a certain one-seated carriage to which was attached a certain single horse of the plaintiff, being then and there driven by the said plaintiff to and toward said last mentioned crossing at a moderate gait; that the said plaintiff and the said wife in her life-time, were then and there using, exercising and employing all necessary, due and reasonable care and diligence on their part, and on the part of each of them, in and about approaching and attempting to pass over said street and railroad crossing, and all due care, caution and diligence required to be used on their part, and on the part of each of them.

Yet, the said defendant, well knowing the premises and notwithstanding its duty to use and employ all such reasonable care, caution and diligence in running and propelling its said steam locomotives and trains of cars over and along its said railroad, in approaching and over and across said public street known as avenue, in said city of, so as not to injure the said plaintiff or his said wife, or any other person or persons lawfully traveling over said public street and crossing; to sound the whistle and ring the bell upon all its said locomotives approaching and passing said street crossing as aforesaid; to run its locomotives and trains of cars at a moderate and lawful speed not exceeding the rate of, to wit, (....) miles per hour over and across said street crossing; to maintain and have such proper lookout from and control over its said locomotives and trains of cars as to be able to make the stops required by law and prevent injury to plaintiff or his wife, or any other person or persons, while passing or attempting to pass over said street crossing; and to apply

and use all reasonable and necessary care, precaution and means to prevent injury to any person or persons in danger of life or limb while passing or attempting to pass over said public street crossing, by stopping its locomotives and trains of cars, or otherwise avoid injury to the plaintiff or any other person or persons while passing or attempting to pass over such crossing; not to violate its own regulations for running its locomotives and trains of cars aforesaid, nor the provisions of the ordinance of the city of above specified and counted upon herein; not to run its locomotives and trains of cars over said crossing at a high, dangerous and unlawful rate of speed without having sounded the whistle upon any such locomotives as an alarm at such crossing, or to plaintiff or other person or persons passing or attempting to pass over the same, until within, to wit feet of such crossing; and not to sound such whistle when so running its locomotives and trains of cars and within said distance of such crossing aforesaid, so as to frighten the horse of the plaintiff or any other person while passing over, or attempting to pass over such crossing aforesaid, thereby causing or tending to cause injury to said plaintiff or any other such person, did then and there so negligently, wilfully, recklessly and carelessly, and while the said plaintiff was driving with his said horse and carriage, as aforesaid, over said street crossing, with all due, proper and reasonable care, caution and diligence on his part, as also on the part of his said wife, run and propel by steam, to wit, its certain steam locomotive and train of baggage and passenger cars attached thereto, along said railroad to the southwest, on the northwesterly main track thereof, and over and across the said public street crossing, at a high, dangerous, unlawful, wilful, and reckless rate of speed, to wit, at the rate of (....) miles per hour, without having sounded the whistle on said locomotive or rung the bell thereof on approaching and passing over said crossing, as required by law, and without keeping any proper or sufficient lookout for danger to said plaintiff and his said wife, or other person or persons lawfully traveling upon said street and over said street crossing, or having or keeping such control over said locomotive and train of cars last aforesaid as to make the stop required by law or prevent injury to the said plaintiff or other person or persons so traveling over said street crossing as aforesaid, and without having used and employed the reasonably necessary means within its power to prevent injury to the said plaintiff and his said wife, by stopping its said train or otherwise avoiding injury to said plaintiff and his said wife while passing over said street crossing aforesaid, all in negligent, wilful and reckless disregard and violation of its duty aforesaid, as also of its own regulations and the ordinance of said city of as hereinbefore set forth and alleged; and said defendant did, then and there, while said plaintiff

and his said wife were passing over such crossing, with all due care, caution and diligence on their part, as aforesaid, negligently and carelessly give, to wit, sharp, short sounds with the whistle of its locomotive aforesaid, in rapid succession, and within, to wit, feet of such crossing and of said horse and carriage, thereby so frightening said horse that it then and there turned suddenly back upon the track of said defendant in front of its said locomotive and train of cars aforesaid, and became so unmanageable that the plaintiff was wholly unable to get said carriage off such track in time to avoid accident and injury from said locomotive and train of cars aforesaid; whereby and by reason whereof said locomotive and train of cars of the said defendant with great force and violence ran against and collided with said carriage, in which said plaintiff and his said wife were seated as aforesaid and passing over said crossing with all proper care, caution and diligence, and without negligence on their part, or on the part of either of them, whereby and by reason whereof said carriage was overturned, broken to pieces and destroyed, and the said plaintiff and his said wife were thereby, then and there, with great force and violence, struck, precipitated, cast and thrown a long distance, to wit, the distance of (....) feet, against, among and upon divers, to wit, the ties and iron rails of said defendant's northwesterly main track last aforesaid, the wreckage of said carriage, plank, stone and posts, and upon the ground, and were then and there thereby greatly bruised, wounded, mangled and crushed, insomuch that the said wife of said plaintiff, was thereby then and there killed, and did then and there forthwith die from such injuries so received as aforesaid; that the left foot and ankle and the left arm, and the bones thereof, of the said plaintiff were then and there so mangled, torn, lacerated and crushed by reason of, to wit, the wheels of said locomotive having run and having passed over the same that it became and was necessary to amputate said left foot and leg at a point, to wit, about inches above the ankle joint, and his said left arm at a point, to wit, about inches below the elbow; and that the said left foot and left leg and said left arm of the said plaintiff were thereupon amputated on, to wit, the day of, 19.., by reason and in consequence of the said wilful, reckless, and careless conduct and acts of said defendant, and the injuries then and there received as aforesaid, and were wholly lost to said plaintiff.

And the said plaintiff avers that, by reason of the premises aforesaid, he became sick, sore, lame and crippled for life, and has been and is greatly injured, and put to large expense and trouble in and about procuring necessary nursing, care and attention for himself, and in and about the procuring of the necessary care and medical and surgical attendance of and

for himself, and in and about the funeral and burial expenses of his said wife; that said plaintiff by reason of the premises has been caused great suffering of mind and body, and prevented from following his usual and necessary occupation and employment for a long space of time, to wit, from thence hitherto, and also by reason of said injuries so received by him as aforesaid, he, the said plaintiff, will continue to suffer great pain of body and mind and will continue to be largely prevented from following or carrying on his necessary avocation, employment or business, and will also be deprived of the services, society and comfort of his said wife for a long space of time, to wit, for and during his, the said plaintiff's natural life. All to the great damage and injury of the said plaintiff, to wit, the sum of dollars.

1602 Railroad platform, Narr. (Ill.)

For that whereas, the is, and at all times hereinafter mentioned was a corporation organized and existing under and by virtue of the laws of the state of Illinois; and as such corporation was in possession of and using and operating a steam railroad extending through the county of in said state and was then and there and now is a common carrier of persons for hire.

That on or about the day of, 19.., plaintiff became a passenger on a certain car of defendants on said railroad to be carried from near street in the city of to station in said city, county and state; and thereupon was accordingly carried in said car as a passenger of defendant, for certain compensation then and there paid to the defendant by plaintiff.

And it then and there became and was the duty of the defendant to provide proper, suitable and safe platforms at its said station at on which passengers and plaintiff in particular could safely alight when leaving defendant's cars, and so that the public and plaintiff as such passenger in particular, in alighting therefrom, might do so in safety to life and limb; but therein defendant wholly failed and made default, and on the contrary thereto did carelessly, recklessly, negligently, wilfully, unlawfully, and wantonly fail to furnish a proper, suitable and safe platform at the said station, which was then and there one of defendant's regular stopping places and stations for the receiving and discharging passengers, at the place where plaintiff was required to alight and on which plaintiff might safely alight; and that by reason of the carelessness and negligence of the defendant in this behalf, while plaintiff was such passenger and in the exercise of all due care and caution, was attempting to get off of defendant's said car at the station, she was thereby then and there thrown with great force and

violence off said car to, upon and against the ground, and upon and against said car, and thrown backward striking her head and body against the car and ground, and rendering her insensible and unconscious; and plaintiff was then and there and thereby disordered and injured and is still languishing and is intensely suffering in body and in mind, and in the future will continue to suffer from the effects of said injuries for the rest of her natural life, and she was hindered and prevented from attending to her necessary business and affairs and lost and was deprived of divers great gains which she might and otherwise would have made and accumulated, and she was compelled to and did pay out, expend and become liable for the payment of divers large sums of money for doctor bills, drugs, medicines, nursing, care and attention in and while attempting to cure herself and to be cured of the wounds, bruises and injuries occasioned as aforesaid.

Wherefore, etc.

1603 Roof, covered hole, Narr. (Ill.)

For that whereas, on, to wit,, 19.., and for a long time previous thereto, at, to wit, the county aforesaid, the deceased,, was in his life time, an employee of the said defendant D, in and about the business of making and repairing boilers, smoke-stacks, etc., and was accustomed to do his work as a servant and an employee of said D in his said business wherever directed by said D.

And the plaintiff avers that on and long previous to said last mentioned date, at, to wit, the county aforesaid, the defendant, the S company occupied and had possession of a certain building including the roof and certain large pipes or smoke-stacks protruding and extending through said roof situated and being on the southwest corner of and streets in the city of; and being desirous of having said large pipes or smoke-stacks removed from said roof, on, to wit, the day of, 19.., at, to wit, the county aforesaid, applied to the said defendant, D, through his servants and employees to undertake the work of removing said pipes or smoke-stacks; that the said defendant D, after an examination of said pipes or smoke-stacks on said roof, did, on, to wit,, 19.., accede to said request, and did then and there undertake and agree to send his servants and employees on said roof to remove the same, and accordingly did for said purpose, send and direct his servants, including said, on, to wit,, 19.., to go upon said roof and remove said large pipes or smoke-stacks; that the said roof, at the time and place aforesaid, had in it near one of the stacks, which said was directed to take down and remove, a large hole which was covered over with tar paper so that its danger was hidden; that said hole

so covered over and without any barrier or notice of its dangerous condition, had so existed for a long space of time previous to said date, to wit, for the space of weeks; that the defendant, the S company, with knowledge of its condition and the situation, had known of said going on said roof to do his work, as aforesaid, but had given him no notice or warning of said danger; and that the said defendant D who also had knowledge of said condition and whose duty it was to use reasonable care in providing a reasonable safe place for said to do such work wholly neglected and failed so to do, or to give any notice of the dangers then existing on the roof aforesaid.

And the plaintiff further avers that said, while in the exercise of due care and caution for his own safety, and with no knowledge of said danger, while in the performance of his work in preparing said stack for removal, and in removing the same, necessarily and unavoidably, stepped on said tar paper covering said hole as aforesaid, and was suddenly without any warning, precipitated down said hole for a great distance, striking his head and limbs against a cross-beam and irons in there, whereby, his head was crushed, his legs and body bruised and he sustained serious and fatal injuries from which, in a short time thereafter, he died. (Add last two paragraphs of Section 1495)

1604 Running board of street car, Narr. (Ill.)

For that whereas the defendant before and at the time of the grievances herein complained of was the owner of and was operating a certain street railway in the city of in said county and state, by means of cars run upon iron rails and propelled by means of electricity, and that such street railway was operated by the defendant for the conveyance of passengers for hire and reward; that on the day of, 19.., said plaintiff became a passenger upon one of defendant's cars in the said city to be carried from to street in said city for a certain reward to the defendant; and that thereupon it became and was the duty of the defendant to safely carry the plaintiff to the place of his destination along the line of said street railway.

Yet, the defendant did not regard its duty in that behalf, but negligently permitted more persons to become passengers on said car, after the plaintiff had become a passenger, than said car would reasonably accommodate, and by reason of such a large number of persons being by said defendant so negligently permitted to ride upon said car, a great crowd of persons was collected on said car so that the same became and was greatly over-crowded, and the plaintiff was thereby forced to ride upon the platform and steps of said car; and while the plaintiff was in the exercise or of ordinary care for his own

safety in so riding on such platform and steps of said car, the crowd of persons so negligently permitted by the defendant to take passage upon said car and who were then and there compelled to ride upon the platform and steps of said car, were by the motion of said car thrown and forced over and against the plaintiff, whereby the plaintiff was forced off and pushed from the platform and steps of said car where he was compelled to ride by reason of said such over-crowded condition of such car.

2. And thereupon it also became and was the duty of the defendant to run its car at such a rate of speed as would be least dangerous to the passengers on said car commensurate with the practical operation of said car.

Yet, the defendant did not regard its duty in that behalf, but after the defendant had taken passage on said car, other persons continued to come upon said car with the permission of the defendant, through its servants, in such numbers that said car would not accommodate them and its seating capacity was greatly over-crowded by reason of such number having taken passage on said car, and the plaintiff thereby was forced, with other persons, to ride upon the steps and platform of said car which defendant's servants in charge of said car then well knew; that the servants of said defendant so in charge of said car, not regarding their duty, negligently ran the said car at a highly dangerous rate of speed while the plaintiff and other passengers were so riding on the platform of said car and such other passengers were surged and tossed over and against the plaintiff by reason of the excessive speed of said car, and whereby, while the plaintiff was using ordinary care for his own safety, he was crowded and pushed off the platform and steps of said car.

By means of which, the wheels of said car caught and passed over the left foot and leg of the plaintiff and the same was thereby crushed, broken and lacerated so that it had to be and was amputated; that by reason of said injury, the plaintiff has endured, and will endure, great pain and suffering and was and is prevented from carrying on his business and affairs and was and will be thereby deprived of great gains, and has laid out a large sum of money for physician's services and medicines and has become obligated to pay out a large sum of money for nursing, care and medical treatment in being treated for his said injury; and that he has sustained lasting and permanent injuries: to the damage, etc.

(Michigan)

For that whereas, the defendants are common carriers of passengers for hire, and as such operate a line of electric railway in the township of, upon what is known as the turnpike highway, or the

road, said road being an old established highway of an existence of upwards of twenty years past.

And plaintiff avers that he being in the village of upon the day of, 19.., and desirous of going to a place known as, took passage upon an electric car of said defendants, duly manned by a motorman and conductor, and paid to the conductor of defendant his fare by ticket for transportation; whereupon, plaintiff avers, that it became and was the duty of the defendants to afford him (plaintiff) a safe place to ride and safe ingress and egress from said car. And plaintiff avers that the defendants, notwithstanding their legal duty in the premises, did not afford to plaintiff a safe mode of exit from said car. But notwithstanding the fact that plaintiff notified defendants' conductor of where he desired to alight, both orally and by bell, the defendants and its said servants propelled the car in which plaintiff was at a terrific rate of speed, and at a rate exceeding, in plaintiff's judgment, miles an hour around curves and figure S, formed by said track at the destination of plaintiff, without slackening its speed; and plaintiff avers that he, believing that he was to be let off the car in which he then was, at the place indicated, was expecting said car to slow up and permit him (plaintiff) to alight in safety, but that said car, contrary to his expectations, did not so slacken up its speed, but on the contrary continued on at its great speed, about o'clock in the evening; and plaintiff avers that by the momentum and curve-like motion of the car, so going, as aforesaid, he was thrown from the rear platform of said car upon the highway upon which said electric car was being propelled by the defendants' servants and agents, and severely injured by the wrongful and negligent acts of the defendants, its servants and agents, and without any wrong doing or contributing negligence upon the part of plaintiff. And plaintiff avers that he was seriously and permanently injured by the treatment he so received; that his face and head and trunk and body and legs were bruised and injured, his flesh bruised and his bones broken and injured, his muscles and tendons and internal parts torn, wrenched and injured and he himself permanently disabled and caused to suffer great pain and injury and be rendered sick, sore, lame and disordered, a condition in which he (the plaintiff) has remained from thence hitherto.

And plaintiff avers that he was forced to employ nurses, physicians, drugs and medicines in and about the assuaging of himself of his pain and suffering from thence hitherto; and that he will be forced to lay out large sums of money in the future for the same purpose, all to a large sum of money, to wit, dollars.

That plaintiff's occupation is that of a laboring man, he being a teamster, and that by reason of said injuries plaintiff

was hindered and prevented from following his usual avocations from thence hitherto, and will in the future to his great injury, to wit, dollars.

And the plaintiff avers that he did then and there receive other wrongs and injuries from the wrongful acts and doings and unlawful actions of the defendants without wrongdoing upon his own part.

All of which is to the great damage of the plaintiff of dollars; and therefore he brings this suit.

(West Virginia)

For this, to wit, that before and at the time of committing the grievances hereinafter mentioned, the said defendant was the proprietor of a certain railroad running from line near the town of, along the public highway and over intervening country to and through the city of, county, West Virginia, and also the owner and proprietor of certain cars and carriages propelled on and over said railroad by the means of electricity, for the carriage of passengers, and was a common carrier of passengers, for hire and reward to the said defendant in that behalf, from and near the state line the eastern terminus of said railroad and the intermediate points to the city of, to wit, at the county aforesaid; and the said defendant being such proprietor of the railroad and car and carriage, and such common carrier of passengers heretofore, to wit, on the day of, in the year 19.., the said, at the special instance and request of the said defendant, became and was a passenger in one of the cars or carriages of the said defendant, to be safely carried thereby on a certain journey from a place on said railroad about four miles east of the city of, known as the park to the city of, as aforesaid, for a certain fare and reward to the said defendant in that behalf, and the said defendant then and there received the said as such passenger; and thereupon it became and was the duty of the said defendant to use due and proper care that the said should be safely carried by the said railroad company on the said journey; and it was its duty to furnish the said a safe place to ride in its said car or carriage on said journey, and it was the duty of said defendant to furnish sufficient cars or carriages to carry and transport in safety the passengers from the said park to the city of; yet, the said defendant, not regarding its duty in that behalf, did not use due and proper care that the said should be safely carried by its said car or carriage on his said journey, but wholly neglected so to do, and suffered and permitted the car or carriage upon which the said took passage to be so greatly

over-crowded with passengers that the running boards and front and rear platform and the inside thereof were occupied and crowded with passengers, and while the said car or carriage was so over-crowded with passengers the said defendant received and accepted and collected the regular fare from him, and after the said had been received and accepted by the said defendant as a passenger, as aforesaid, the car or carriage of said defendant upon which he took passage was so over-crowded with passengers, that the said was unable to secure a seat therein, but on account of the over-crowded condition of the said car or carriage was compelled to and did sit on the edge and ride on the outside on what is commonly known as the running boards of said car or carriage, and after receiving and accepting the said as a passenger upon its said car or carriage in its then over-crowded condition and when the said was sitting and riding upon the edge of said car or carriage or running boards as aforesaid, the said defendant company at a great rate of speed, and when the car or carriage upon which the said was then riding was passing another car or carriage of the said defendant company's going in an opposite direction, at a point on said railroad track east of the station thereon known as so negligently, carelessly and decklessly drove and propelled the car or carriage upon which the said was then and there riding that the said by reason of the rocking and shaking and jarring of said car or carriage and by reason of the over-crowded condition thereof, and the failure of the defendant to furnish him a safe place therein to ride was thrown from the said car or carriage and killed.

And the plaintiff avers that by reason of the matters and things in this count mentioned the plaintiff has sustained damages to the amount of (\$.....) dollars; and therefore he sues, etc.

1605 Scaffold injury, Narr. (Ill.)

For that whereas, on or about the day of, 19.., the defendant was in the business of contracting, and on and prior to the date afore-mentioned, was engaged in the construction of a certain elevator, to wit, elevator of at or near street, in the city of, county of and state of Illinois, and was then and there particularly engaged in the placing of a certain line shaft in the said building and over and above certain bins in said building or elevator, at a point a great distance from the ground, to wit, about feet from the ground, and had then and there in his employ, as a millwright and for other certain labor, plaintiff's intestate,, who

was then and there assisting in the placing of the said line shaft and was boring holes in the said building for the purpose of furnishing a means of holding the said line shaft in place; and there was then and there within the bins and at the top thereof, and about feet from the ground, certain scaffolds which were placed within the said bin for the purpose of furnishing a place for the plaintiff's intestate and others to work upon, while placing the said line shaft into position; and the said platforms, as aforesaid, were two in number in each bin and were composed of two stringers or beams each, and upon the said beams or stringers at right angles to the same, were placed certain planks, for the purpose of furnishing a platform for the said employees aforesaid, and said stringers rested upon certain logs, projecting from the sides of the said bin, and the said scaffolds were then and there used by the employees of the said defendant, and the said employees were directed to work thereon, and the platform was a place to work furnished by the said defendant and especially to the said plaintiff's intestate; and plaintiff alleges that it was then and there dark upon the said scaffold by reason of the proximity of the said scaffolds to the roof and because there was little or no means of throwing light upon the said scaffolds, so that it was difficult for those walking upon the said scaffolds to observe definitely the said scaffolds.

And plaintiff avers that it was then and there the duty of the said defendant,, to use care to furnish a reasonably safe place for plaintiff's intestate to work upon and in, and to use care to furnish a reasonably safe scaffold upon which he was to work; and plaintiff avers that it was then and there the duty of the said defendant to inspect the said scaffold before ordering the said plaintiff's intestate to work thereon; but that the defendant wholly and utterly failed in its duty in this regard, and failed to inspect the said scaffold, which was then and there defective by reason of certain boards thereon being missing, removed and absent, so that there was a break in the platform, through which one might fall to the bottom of the bin,²¹⁹ which said break or hole could have been observed by the exercise of proper inspection; so that by reason of the negligence aforesaid, the plaintiff's intestate who was then and there ignorant of the existence of said hole, and while exercising all due care and caution for his own safety, was walking over and upon the said platform, under the directions of said defendant, the, and while engrossed

²¹⁹ The declaration in this case contained four counts. Counts three and four were dismissed. The first count was substantially the same as the second except that it did not charge the duty of inspection and it alleged after the word "bin" "all

of which the defendant knew, or could have known, in the exercise of care for the safety of plaintiff's intestate, and all of which the plaintiff's intestate was ignorant." *Dickson v. Swift Co.*, 238 Ill. 62 (1909).

in his work and while relying upon the said defendant having furnished him a reasonably safe scaffold, he came to and stepped into the hole, where the boards had been removed or were missing, and he was then and there precipitated to the bottom of the said bins, by reason of the negligence of the said defendant aforesaid, and he was killed. (Add last two paragraphs of Section 1495)

b

For that whereas, heretofore, on, to wit, the day of, 19.., the defendant, in the city of, county of and state of Illinois, was engaged in the construction of, and was assisting as a contractor and otherwise in the construction of a certain building, to wit, a powerhouse for the company, and was employing certain servants then and there in said work, and had charge of and was using in said work on the interior of said building, certain scaffolding made of planks and boards; and whereas the plaintiff was then and there employed (but not by the defendant), in and about a certain ash hopper therein, which fact was then and there well known to the defendant and his said servants, or might have been known to them by the exercise of ordinary care on their part; it became and was the duty of the defendant by his servants in that behalf then and there to use ordinary and reasonable care in and about the work of the defendant, so as not to injure the plaintiff and so as not to expose him to unreasonable danger; yet, the defendant, not regarding his duty in that behalf, by his said servants then and there negligently knocked, pushed and pulled down a part of said scaffolding and the planks and boards thereof, and suffered the same to fall with great force down to and upon a certain timber then and there, whereby said timber was then and there caused to fall with great force and violence upon and against the plaintiff, who was then and there and at all times herein mentioned in the exercise of due care for his own safety, inflicting upon him the injuries hereinafter mentioned.

2. And for a second count in this behalf, the plaintiff avers that, being so engaged as aforesaid, it also became and was the duty of the defendant by his servants in that behalf then and there in removing said scaffolding, planks and boards, as aforesaid, to exercise reasonable care to prevent the same then and there from injuring the plaintiff or causing injury to the plaintiff; yet, the defendant, not regarding his duty in that behalf, by his said servants negligently failed then and there to have and use in the removing of said scaffolding, planks and boards as aforesaid an appliance or appliances reasonably adapted to arrest and check the sudden and forcible fall of said scaffolding, planks and boards, in consequence whereof

the same then and there, while the defendant by his said servants was removing them as aforesaid, fell suddenly and with great force upon a certain heavy timber then and there and caused the same to fall suddenly and with great force then and there upon and against the plaintiff, who was then and there and at all times herein mentioned in the exercise of ordinary care for his own safety, inflicting upon him the injuries hereinafter mentioned.

3. And for a third count in this behalf, the plaintiff avers that, being so engaged as aforesaid, it also became and was the duty of the defendant, by his servants in that behalf, then and there to warn the plaintiff of the knocking, pushing and pulling down, and the causing to fall, as aforesaid, of said scaffolding, planks and boards.

Plaintiff avers that the defendant, however, not regarding his duty in that behalf, by his said servants negligently failed to warn the plaintiff then and there as aforesaid, in consequence whereof, the plaintiff, who was then and there, and at all times herein mentioned, in the exercise of ordinary care for his own safety, was unable to get out of the way of and escape said heavy timber, and did not get out of the way of and escape the same, and in consequence thereof said timber then and there struck with great force against the plaintiff.

And the plaintiff avers that the fall of said timber, as aforesaid, crushed and shattered his right hand then and there, so that a part of the same had to be amputated, and by reason thereof plaintiff then and there became and was sick, sore, lame, disordered and permanently injured, during all of which time, to wit, from thence hitherto, he thereby suffered great pain.

Plaintiff avers also that by reason of his said injuries he was then and there obliged to expend and become liable for divers large sums of money in endeavoring to be cured and healed of his hurts and wounds occasioned as aforesaid; that he has been hindered from attending to his ordinary affairs and business during all the time from thence hitherto, and has been hindered from engaging in his usual occupation, to wit, that of a boiler maker's helper; that he has thereby been prevented from earning divers large sums of money as wages, to wit, \$. per day, and that by reason of said injuries he will be prevented from engaging in said occupation during the rest of his life. Wherefore, etc.²²⁰

(Michigan)

For that whereas, for a long time prior to and on the day of, 19., said plaintiff had been employed at his trade or business as a carpenter and builder in and about

²²⁰ O'Rourke v. Sproul, 241 Ill. 576 (1909).

the said city of and elsewhere, and had at that time acquired great skill and proficiency thereat, whereby he was able to earn and did earn good wages, to wit, the sum of (\$......) dollars to (\$......) dollars per day.

On the said day of aforesaid, at or about o'clock in the afternoon thereof, said plaintiff was engaged at his said trade or business erecting and finishing a certain building at the corner of avenue and street in the said city of, where said plaintiff was working upon a scaffold on the outside of said building, about ten feet from the ground, duly and lawfully engaged in pursuit of his said trade or business, using due diligence, care, caution and prudence in and about his said work that it might be carried on with safety to his person with regard to the nature of said work.

Plaintiff further avers that whilst he was so engaged, working at said building on said scaffold, aforesaid, said defendants, who were engaged in carrying on and conducting the business of painting buildings, among other things, in and about the said city of, were by their agents or servants engaged, on the said day of aforesaid, in painting the said building aforesaid, where said plaintiff was engaged at his carpenter work as aforesaid, and on the same side of said building where said plaintiff was working as aforesaid. Said defendants, their agents or servants so engaged in painting said building as aforesaid, were using a long heavy ladder in their work, which, when the bottom end thereof rested upon the ground would reach up upon the side of said building several feet higher than plaintiff was when he was upon said scaffold at work as hereinbefore stated. Said defendants, their said agents or servants, used said ladder in and about their said work of painting said building, ascending and descending upon it, moving it about from place to place upon said building as a means to reach their said work of painting said building, upon the day and hour hereinbefore mentioned aforesaid.

And plaintiff further avers that it then and there became and was the duty of defendants, their agents or servants and each of them, to use ordinary and reasonable care, caution, diligence and prudence in and about the premises and to handle, fix, place, support, use and control said ladder in using it in and about their said work of painting the said building upon which said defendants, their said agents or servants and said plaintiff were at work at one and the same time as aforesaid, so that said ladder would not fall upon or strike said plaintiff and thereby do him injury and damage.

Yet, the defendants, the said and
....., their said agents or servants, and each of them, well

knowing their said duties in the premises and being in default thereof, and wholly neglecting and disregarding said duties, on the said day of, 19.., at or about o'clock thereof as aforesaid, did handle, fix, place, support, control and use said long heavy ladder in such a negligent, careless, heedless, and reckless manner in and about their said work of painting said building aforesaid, where said plaintiff was at work aforesaid, as to cause or permit said long, heavy ladder to fall upon said plaintiff while he was lawfully and with due regard to his safety at work upon said scaffold at said building aforesaid, said ladder striking said plaintiff a very severe and violent blow upon his head, cutting a large, severe and painful gash on his head, causing him to become unconscious so that he fell upon said scaffold, said ladder then knocking said scaffold and plaintiff violently to the ground, a distance of nine or ten feet, breaking said plaintiff's right collar bone, breaking his right elbow, and causing him severe and permanent injuries to his head and the bones thereof, his scalp, his right shoulder, his right arm, the elbow thereof and permanent injuries to the bones, muscles, cords, flesh, tendons, ligaments and nerves thereof. Said injuries causing plaintiff the permanent loss of the ordinary use of his said right shoulder, right elbow, right arm and the hand thereof. Said injuries then and there causing said plaintiff to become sick, sore, lame, wounded, bruised and disordered from thence hitherto, causing him much severe mental and physical pain, anguish and suffering.

Whereof and whereby said plaintiff has been and now is deprived of the ordinary use of his said right hand, arm and shoulder and has constantly been and now is troubled with severe pains in his head, said right arm and shoulder, and is and has been thereby permanently rendered unfit and unable to attend to his said business and the ordinary affairs of life. So that he has there and thereby suffered great loss in his earnings as a carpenter at a salary of (\$....) dollars per day to the amount, to wit, (\$.....) dollars. And whereof and whereby said plaintiff has been obliged and compelled to pay out and expend large and divers sums of money in procuring for himself various drugs and medicines, medical and other attendance in order to care for himself, and in endeavoring to be healed and cured of his said injuries hereinbefore mentioned and the ill effects and results thereof aforesaid to the amount of dollars and upwards. To plaintiff's damage in the sum of dollars, and therefore he brings his suit.

1606 Scenic railway, action

Persons or corporations operating a scenic railway are liable in damages for the failure to exercise the highest degree of care

and caution for the safety of their passengers, and for an omission to do all that human foresight and vigilance can reasonably do consistent with the mode of the conveyance, and the practical operation of such railway, to prevent accidents to passengers while riding on the cars, the same as common carriers.²²¹

1607 Scenic railway, Narr. (Ill.)

For that whereas, the defendants, on, to wit, the day of, 19.., were corporations duly organized and engaged in the management and operation of a certain pleasure resort or place of amusement known as, to wit,, in the township of, which said park was generally advertised as containing interesting attractions including conveyance on, to wit, a scenic railway, which consisted of small open cars discharged at an elevation on a narrow gauge railway the surface thereof being uneven with sharp inclines and short turns and when the cars were released on said railway they would encircle the track at the rate of, to wit, miles per hour, of their own momentum acquired at the start from said elevated point of release, and the subsequent descending grades in said railway, so as to return to a point, to wit, feet from the starting place, of their own motion.

And the plaintiff avers that it then and there became and was the duty of the defendants to exercise reasonable care and diligence in the construction, maintenance and operation of said railway and cars thereon, and also to inspect, examine and repair their said railway and cars at frequent intervals so as to keep them in reasonably safe condition and repair for the safe conveyance of persons patronizing said railway and so as not to injure persons riding on said cars while in the exercise of reasonable care and who had paid the fare demanded of them by the defendants; yet, the defendants, notwithstanding their said duties on, to wit, the date aforesaid, carelessly, negligently and wrongfully maintained and operated said railway with one of its cars in an improper and unsafe condition, and failed and neglected to inspect, and examine, repair and maintain said scenic railway and cars thereon in a reasonably safe condition for the conveyance of passengers; but the defendants permitted and allowed said scenic railway and the cars thereon to become impaired, defective and unsafe, of which defendants in the exercise of reasonable care could have had notice; and as the plaintiff, on the date aforesaid, was riding in one of the cars of the defendants on said scenic railway and was in the exercise of reason-

²²¹ O'Callaghan v. Dellwood Park Co., 242 Ill. 336, 343 (1909).

able care and had paid his fare therefor, by reason of the defendants negligence in not inspecting and repairing said railway and cars and allowing the said railway and the cars to become defective and unsafe, the car in which the plaintiff was then and there riding at the rate of, to wit, miles per hour, without notice, warning or knowledge on the part of the plaintiff, then and there suddenly decreased its speed and stopped in a violent manner and partially tipped forward, whereby the plaintiff was thrown from said car to and on the hard surface of the ground there, a distance of, to wit, feet; and the plaintiff was then, there and thereby seriously and permanently injured in divers parts of the body including his head, arms, stomach and nervous system, which said injuries caused the plaintiff great pain and distress from that time hitherto, and he still suffers therefrom, and the plaintiff lost wages amounting to, to wit, dollars and incurred expenses amounting, to wit, dollars in endeavoring to be healed and cured of said injuries, to the damage, etc.

1608 Shafts and openings unprotected, action

The barrier or railing required to be erected around shafts and openings in floors of buildings in process of construction or repair must be of a character to afford substantial protection to men who are engaged in work in such buildings, and the owner and contractor are civilly liable for injury resulting from a failure to perform this duty. The statute which imposes the foregoing duty is constitutional.²²²

1609 Shafts and openings unprotected, Narr. (Ill.)

For that whereas, heretofore, on, to wit, the day of, 19.., the defendant,, was the owner of a certain high building which was then and there in the course of construction and erection on, to wit, street, in the city of in the county and state aforesaid, and was then and there a building contractor by occupation, and as such was then constructing and erecting a part of said building for said and each and both of said defendants, prior to and then and there had charge of the construction and erection of said building, and the, deceased, was then and there a plumber by trade, and as such was then and there employed by a contractor, who had a contract with the said

²²² Claffy v. Chicago Dock & Canal Co., 249 Ill. 210 (1911); Sec. 7, Laws 1907, p. 314.

for the doing of part of the work in and about the construction and erection of said building, and the deceased as such plumber earned, to wit, dollars per day.

And the plaintiff further alleges that the said was, prior to and then and there using within said building a certain elevator or hoist for the purpose of lifting materials to be used in the construction of said building from the ground to the upper floors of said building, and which said elevator or hoist, was then and there operated up and down through a certain shaft or opening in, to wit, the floor of said building. And by reason of the premises and of the statute in such case made and provided, it was prior to and then and there the duty of the defendants and each of them, to cause said shaft or opening in said floor to be inclosed or fenced in on all sides by a substantial barrier, or railing, at least eight feet in height; but the plaintiff alleges that the defendants, and each of them prior to and at the time and place aforesaid, wilfully failed to cause such shaft, or opening, in said floor to be inclosed, or fenced in, on all sides by a substantial barrier or railing at least eight feet in height, or by any other safe and suitable barrier or railing, but therein wholly failed, and made default.

And the plaintiff further alleges that at the time aforesaid, deceased in the discharge of his duty to his said employer was working upon said floor upon and about a certain pipe, which was alongside of and close to said shaft, or opening, in said floor, and the erection and placing of which pipe at the place was part of the work required of his said employer by his contract with the said And the plaintiff further alleges, that while the deceased was so working upon said floor, and upon or about said pipe, as a direct result and in consequence of the defendants' said wilful failure to cause said shaft, or opening, in said floor to be inclosed, or fenced in, on all sides by a substantial barrier or railing, at least eight feet in height, or by any other safe and suitable barrier, or railing, he thereby then and there accidentally fell into and down through said shaft, or opening, a great distance, to wit, stories, and he thereby then and there sustained such bodily injuries, that he died as a result thereof a short time afterwards, in the county and state aforesaid.

And the plaintiff further alleges that the deceased then and there left him surviving the plaintiff, who alleges she was his wife and is his widow, and his children, and all of whom, she alleges are still living, and that she and they, before and at the time of deceased's death, were dependent upon deceased for their support, and that by reason of the death of the deceased, she, the plaintiff, and his said children have been deprived of large sums of money and pecuniary services which deceased would otherwise have contributed and rendered to her and them for her and their support, care and

otherwise. And the plaintiff further alleges that she brings this suit for the benefit of herself and said children. To the damage, etc.

SIDEWALK INJURIES

1610 Generally

A municipality is liable for an injury sustained upon a sidewalk which it had permitted to become unsafe.²²³ In Michigan the liability of a municipality for an injury sustained by a private person from a failure to repair sidewalks, highways, etc., is purely statutory and is limited to bodily injuries and to damages to certain property interests. The loss of a wife's services on account of an injury sustained upon a sidewalk is not considered a property interest within the meaning of the statute.²²⁴

1611 Declaration requisites

In charging negligence in keeping a sidewalk in repair, the location of the sidewalk is an essential element of the cause of action.²²⁵ In an action against a municipality for an injury sustained upon a sidewalk, it is necessary in Michigan to expressly allege that the street within which the accident happened was open to public travel and that it had been a public street or highway for a period of ten years and upwards. It is not necessary to expressly refer to the statute upon which it is founded, provided the cause is so stated as to bring the defendant within the liability created by the statute;²²⁶ and unless demurred to, the declaration which fails to count upon the statute will sustain a judgment.²²⁷

1612 Elevated private sidewalk, Narr. (Ill.)

For that whereas, before and, on, to wit, the day of, 19.., the defendant was the owner of certain premises with a certain building thereon located in the city of, county of aforesaid, at, to wit,; that being so the owner of the said premises the defendant prior to the date aforesaid leased the

²²³ Chicago v. Jarvis, 226 Ill. 614., 618 (1907).

²²⁴ Roberts v. Detroit, 102 Mich. 64, 66 (1894).

²²⁵ Gillmore v. Chicago, 224 Ill. 490, 494 (1906).

²²⁶ Clark v. North Muskegon, 88 Mich. 308 (1891).

²²⁷ Fuller v. Jackson (City), 82 Mich. 480, 482 (1890).

said premises for the purpose of being used as a residence, and after said leasing the tenant of the said defendant remained and was in the possession of the said premises to and on the date aforesaid; that the plaintiff on the date aforesaid was a minor of tender years and lived with parents in said building; that at the time of the leasing of said premises and building by the defendant there was in front of and adjoining said premises a certain public viaduct and sidewalk elevated at a great distance above the ground, to wit, feet; that at and before the date aforesaid the defendant maintained a certain private sidewalk extending from said public sidewalk to the said building for the purpose of ingress and egress of the said tenant and people living in said house including the plaintiff herein, and said sidewalk was elevated above the ground a great distance, to wit, feet; that it then and there became and was the duty of the said defendant to use all reasonable care to cause the said private sidewalk to be so constructed and so maintained with suitable guards, railings and protection so that the same would be reasonably safe for the people who have lawful occasion to pass over said private walk. Yet, notwithstanding its duty in that behalf, the defendant during all the time hereinbefore mentioned, maintained said private walk in a dangerous condition in that it was elevated, to wit, feet above the ground, and was not provided with reasonable guards, railings or protection to prevent children and others having lawful occasion to pass over it from falling therefrom to the ground; that on the day of, 19.., the plaintiff, while in the exercise of such reasonable care as might be expected from a child of years and intelligence, on account of said negligent construction and maintenance of said private sidewalk, unavoidably fell from said sidewalk to and upon the ground below, and thereby was severely injured in and about the body and limbs, and leg was then and there broken by said fall; that in consequence of said injury h.. became sick, sore, lame and disordered and so remained from thence hitherto; during all of which time ..h.. has suffered pain and inconvenience; by means whereof ..h.. says ..h.. has been damaged to the amount of dollars, and therefore ..h.. brings suit.

1613 Hole or washout, Narr. (Ill.)

For that whereas, the defendant, a municipal corporation, in the county of and state of Illinois, before and, on, to wit, the day of, 19.., and for a long time prior thereto, was possessed of and had control of a certain public sidewalk on a certain public street called, in the said city in the county aforesaid,

and it was the duty of said city, during the time aforesaid, to have kept and maintained the said public sidewalk in good and safe repair and condition. Yet, the defendant, not regarding its duty in that behalf, and while it was so possessed of and had control of said sidewalk, to wit, on the day last aforesaid, and for a period of at least a month prior thereto, wrongfully and negligently suffered and permitted a portion of said public sidewalk located on the west side of said street, about feet north of the northwest corner of the intersection of and streets in the said city of, to be and remain in bad and unsafe condition and repair, and at the place aforesaid wrongfully and negligently suffered and permitted a hole, gutter or washout to be and remain in said sidewalk, of great depth, to wit, of about the length of feet, and of about the width of feet, thereby making said sidewalk unsafe and dangerous for public travel. And plaintiff avers that the said defendant knew the condition of said sidewalk on the day aforesaid, or, by the exercise of reasonable and ordinary care in the premises, said city would have known of said unsafe and dangerous condition of said sidewalk at the place aforesaid.

By means whereof, the plaintiff, who was then and there passing along and upon said public sidewalk, upon the west side of said street aforesaid, about feet north of the northwest corner of the intersection of and streets, as aforesaid, and who was then and there in the exercise of all due care and caution for her own safety, then and there necessarily and unavoidably, in walking along and upon said sidewalk, stepped into said hole, gutter or washout, then and there being in said sidewalk, all as aforesaid, and thereby one of the lower limbs of the said plaintiff was then and there twisted, turned and wrenched, and the ankle of said limb, and its component parts, severely torn, broken, misplaced, fractured, and permanently injured, and the plaintiff was otherwise seriously and permanently injured, and she became sick, sore, lame and disordered and so remained for a long time, to wit, from thence hitherto; during all of which time she thereby suffered great pain and was hindered from transacting her household duties and other business and affairs, and her injuries in the respect aforesaid are permanent; and also by means of the premises, the plaintiff was obliged to, and did, lay out divers sums of money, amounting to dollars, in and about endeavoring to be healed of the said wounds, sickness and disorder.

And plaintiff avers further that after the time of the happening of the grievances heretofore herein set forth and described, and on the and days of, 19.., respectively, the said plaintiff, by her attorneys,, caused to be filed, and did file, in the

office of the then city clerk of said city of, and the then city attorney of the said city of, respectively, a certain notice, as is required by the statutes of the state of Illinois, in the words and figures following, to wit:

State of Illinois, }
County of..... } ss.

To the city of, county of, and state of Illinois, and to, city attorney of, in and for said city of

You are hereby notified, that a cause of action has accrued to, who resides at street, with her husband,, by reason of the fact that said, while in the exercise of all due and proper care and caution for her own safety, did, on the day of, 19.., between the hours of o'clock and o'clock .. M., of said day, and after dark, step into an open uncovered and dangerous hole, gutter, or washout in and within street, in said city, on the west side of said street, about feet north of the northwest corner of the intersection of and streets; said hole, gutter or washout being in the cinder and dirt foot passageway or sidewalk on the said west side of said street; which said hole, gutter or washout had existed at said place for a considerable length of time, to wit, month., and thereby by the said stepping into said hole, gutter or washout said did then and there turn, twist, wrench and injure her foot and the ankle and lower limb on side of her body, so that she has been very severely and permanently injured by reason thereof; that her attending physician was, at the time of the accident, and still is,, who resides at the corner of and streets, in the city of aforesaid.

.....
By,
her attorneys.

And the plaintiff further avers that the said city clerk of the city of, and the then city attorney of said city each separately acknowledged the receipt of said notice, and receipted therefor on an original copy of the same, on the said and days of, 19.., respectively, which said original copy, together with said proof of service of said notice, as is required by statutes, was, on the day of, 19.., filed in the office of the clerk of this court, and is now a part of the files of this cause. To the damage, etc.

1614 Loose plank, Narr. (Ill.)

For that whereas, heretofore, on, to wit,, at, to wit,, and said county and state, the defendant was possessed, and had control of a certain public sidewalk, on, to wit,, near, to wit,, in said city; and the defendant carelessly and negligently, and in violation of its duty in the premises, then and there, and for a long time previous thereto, had and kept said sidewalk out of reasonable repair and condition and full of divers holes and weak and insecure, and insufficient, so that, while the plaintiff was then and there, to wit, in the night time, with all due care on her part, lawfully passing upon and over said sidewalk, a certain, to wit, board, to wit, plank constituting a part of said sidewalk then and there, by reason of the premises, flew up and gave way and tripped the plaintiff and she thereby, without fault on her part, fell into a certain hole then and there in said sidewalk, and a certain board in said sidewalk then and there broke, and by reason of the premises, the plaintiff then and there fell upon and against said sidewalk, to wit, through said sidewalk, to wit, to the ground then and there; whereby the plaintiff was greatly and permanently injured, both internally and externally, and was rendered permanently sick, sore, lame, crippled and disordered; and also, by reason of the premises, the plaintiff suffered severe and permanent concussions of the brain and spine and a severe nervous shock, and was rendered permanently subject to headaches, vertigo, sleeplessness and melancholia, and divers other troubles of the head; and divers of the bones of the plaintiff's chest and other parts of her body and of her limbs were thereby broken and dislocated and greatly and permanently bent, strained and otherwise injured; and also by reason of the premises, divers of the nerves, sinews and muscles of the plaintiff were greatly and permanently strained, sprained, ruptured and injured; and other parts of her body were greatly strained, sprained, ruptured, and injured; and the plaintiff was rendered permanently subject to spitting of blood, nausea and vomiting, and was confined to her bed for a long time, to wit, from thence hitherto; and also by reason of the premises, the viscera and internal organs of the plaintiff and her heart and lungs were greatly and permanently strained, sprained, ruptured and injured; and her bladder and womb were greatly and permanently injured and rendered incapable of performing their normal functions properly, and she suffered from bleeding from her private parts and was rendered incapable of child bearing; and also by reason of the premises, the plaintiff has been rendered unable to work, or to follow her usual occupation of housewife, or to perform her usual duties; and was put to a great expense, to wit, an expense of (\$.....) dollars for medicines, nursing and medical attendance, in endeavoring to be

cured of aforesaid injuries, and will be obliged to incur like expenditures permanently in future for the same purpose; and also by reason of the premises, the plaintiff has been and is otherwise greatly and permanently injured, to wit, at said county; wherefore, she says she is injured and has sustained damages in the sum of (\$.....) dollars, and therefore she brings this suit, etc.²²⁸ (Add averments concerning notice as in preceding form)

1615 Obstructed sidewalk, Narr. (D. C.)

For that whereas, on the day hereinafter mentioned, and for a long time prior thereto, there was and still is a certain common public street or highway in the city of, in the District of Columbia, called avenue, south, a certain other common and public street or highway in said city and District called street, south, and a certain other common and public street and highway in said city and District called street, west, which said avenue intersects with said street and with said street, and which said avenue, and streets, were and are used as such streets and highways by the public for passing and repassing on, over and across the same, on foot as well as otherwise; and whereas said defendant, well knowing the premises, was bound to keep said street and highways, and each of them in such condition as to render them safe for passage and transit as aforesaid on, over and across the same; yet, nevertheless, the plaintiff alleges that theretofore, to wit, on the day of, the said defendant, not performing or regarding its duty as aforesaid, wrongfully and negligently caused, permitted and allowed the said common and public streets and highways, to wit, at the southeast corner of their said intersection with each other, to become and remain in a dangerous and unsafe condition, to wit, by causing or permitting an obstruction, to wit, a large pipe, or hose of great diameter, to wit, of a diameter of inches, to be placed and to lie and be upon, across and over, and to project from and above the sidewalk or sidewalks of the said avenue and streets at or near the said southeast corner thereof formed by their said intersection, and especially upon, across, over and from and above the sidewalk of street, at or near the said locality, there to remain, be and continue for a long, unnecessary and unreasonable length of time, when not in use, unattended and without any barricade, precaution, warning, or notice of any kind for the protection of persons lawfully passing along, upon and over the said walks,

²²⁸ *Karczenska v. Chicago*, 239 Ill. 483 (1909).

or to prevent the said obstruction from causing injury to them; by means and in consequence of which gross negligence and failure on the part of the defendant to perform its duty in that respect as aforesaid, the plaintiff then and there, to wit, on the day and year aforesaid, while walking moderately and carefully along the said street, was tripped by and caused to stumble over the said obstruction, which was then and there and for a long time had been so as aforesaid unlawfully and wrongfully caused, permitted and allowed to be in and upon the sidewalk of the said streets and avenue, unguarded and unprotected in any manner whatsoever, through the gross negligence and default of the defendant as aforesaid; whereby the plaintiff was then and there thrown heavily down to and upon the ground, and whereby the plaintiff's arms became greatly bruised, hurt, wounded and injured and the elbow-joint of her said arm was fractured, sprained and bruised and otherwise seriously hurt, cut and maimed, causing permanent and extensive œdema and stiffness of the joint and serious and permanent impairment of the function of the arm, and whereby the plaintiff suffered great pain and mental and bodily anguish; and so by means of said injury, the plaintiff was rendered sick, sore, lame and disordered; and from thence hitherto continued, and will ever continue to suffer great pain and mental and bodily suffering; and was for a long space of time, from thence to the present time, and will ever continue to be hindered and prevented from attending to and performing her ordinary and necessary affairs and duties; and she is seriously and permanently injured in her bodily health and strength; and in attempting to cure herself of her said injuries as aforesaid she was put to great expense, and from thence hitherto has been and will always be put to great expense for the services of physicians to treat her said injuries and for medicine in the treatment of much injuries; to the damage, etc.

(Maryland)

For that the defendant the mayor and city council of aforesaid is a municipal corporation of the state of Maryland, charged by the law with the duty of caring for and maintaining the streets, alleys and sidewalks of the city of, and of keeping the same fit and safe for public travel, and charged with the duty to remove and abate all nuisances and obstructions on said streets, alleys and sidewalks, or on or from any lot within the limits of the city; and it was at the time of the injuries hereinafter mentioned and is now the duty of said body corporate to use reasonable care and caution to keep all of the public streets, alleys and sidewalks in safe condition for public travel and to prevent and remove all nuisances therefrom or on or from any lot within the limits of the city; but disregarding and neglecting said

duty and obligation imposed upon it the said defendant the mayor and city council of did on the day of, 19.., and for a long time prior thereto permit the said, and who conducted a hotel known as hotel on the north-west corner of and streets in the said city of, it being the same property described in a deed from to the said dated the day of,, and recorded among the land records of county in liber No., folio, to stack beer kegs on or near said street one of the public traveled streets of said city at or near its intersection with street and near said hotel in such a negligent manner as to be dangerous to persons passing along and upon said street, and failed and neglected to remove the same and failed and neglected to require the said, and to remove the said beer kegs so negligently stacked by them on or near the side of said street; that on the day of, 19.., the date above mentioned a number of beer kegs were negligently stacked on or near said street at or near its intersection with street and near the hotel so conducted by the said, and to the height of about eight feet by the said, and or their agents and servants; and that on the said day and date, while the said infant plaintiff was passing along and upon the sidewalk on said street at and near its intersection with street where the public using said street travel at all times, and using due care for her own safety, by reason of the negligent and dangerous manner in which they had been piled, one of said beer kegs fell upon said infant plaintiff knocking her down and injuring her left leg so seriously that as a result of said injury the said left leg of said infant plaintiff had to be amputated below the knee; and other injuries were inflicted upon her; and as a result of which said injuries, said infant plaintiff has suffered great pain, and is permanently injured; and that the said infant plaintiff was using due care and caution and was not guilty of negligence contributing directly to the happening of said accident.

And therefore the plaintiff claims \$ damages.

1616 Stairway and passageway, action

A landlord who rents different parts of a building to various tenants and retains control of the stairways, passageways, hallways, or other methods of approach to the several portions of

the building for the common use of the tenants has resting upon him an implied duty to use reasonable care to keep these places in a reasonably safe condition and is liable for injuries which result to persons lawfully in the building from a failure to perform this duty.²²⁹

1617 Stairway and passageway, Narr. (D. C.)

For that heretofore, to wit, on the day of, at the city of, District of Columbia, the defendant was the lessee and in control and possession of certain premises situate in the said city and District, known as theatre, upon which premises the said defendant then and there conducted a public entertainment or theatre and charged prices of admission to all persons entering the said premises for the purpose of witnessing the said entertainment. That the said defendant produced on said premises afternoon and evening theatrical performances known as polite vaudeville entertainments for which entrance fees were by him charged to and required of persons desiring to witness the said performances. That the said plaintiff on the afternoon of the day and year above mentioned, desiring to witness the said performance for that afternoon had purchased for her of the defendant a ticket entitling her to admission on that afternoon to the said premises and to a seat in a lower box on the right hand side of the said theatre. That the said plaintiff was at the time aforesaid duly admitted by the defendant upon presentation of the said ticket to the said theatre and box. That it then and there became and was the duty of the said defendant to so construct and maintain the said premises and especially the aisles and passageways of the said theatre that they would be in a reasonably safe and proper condition for persons properly on said premises and desiring to enter and leave the said premises and the aforesaid box during the said entertainment and at the conclusion thereof. And also to keep the same properly lighted until such persons had a reasonable opportunity to leave the said box and premises at the conclusion of said entertainment. But the plaintiff avers that on the occasion in question the defendant unmindful of his duty in the premises negligently suffered and permitted the said right hand side aisle of said theatre leading from and beyond the entrance to said box, a seat in which the plaintiff occupied, to the exit from said theatre, to be in a dangerous and unsafe condition in this: That the usual and necessary entrance to said box was by a passageway leading thereto from the right hand aisle of the ground floor of said theatre; that the said passageway

²²⁹ Shoninger Co. v. Mann, 219 Ill. 242, 245 (1906).

was separated from said aisle by a curtain hung at the entrance to said passageway from said aisle, which could be drawn aside at either end so as to allow persons access to said passageway from said aisle and to said aisle from said passageway; that there was then and there a descending step in said aisle which extended entirely across said aisle of the height of, to wit, inches, and that the said step was constructed across the said aisle just beyond the point of exit on said aisle from said passageway from said box and at a short distance, to wit, inches, from said point of exit, and extended as aforesaid across aforesaid aisle; that the existence and location of the said step at the place aforesaid in said aisle constituted and was a dangerous construction and a trap both in its construction, itself and also in this; that unless the premises aforesaid at the location of the said step were clearly lighted, a person passing along the said aisle and turning to enter the said passageway and passing along said passageway and turning to enter the said aisle could not see the said step; that said premises were so constructed and maintained that daylight was excluded therefrom and the same were lighted with artificial lights which could be and were by servants of the defendant turned on and off, lowered or heightened by mechanical appliances as occasion should require.

And the plaintiff avers that on the occasion in question the defendant unmindful of his duty in the premises, negligently suffered and permitted the right aisle of said theatre leading from and beyond the said box, a seat in which the plaintiff occupied, to the exit from said theatre, to be in a dangerous and unsafe condition in that there was then and there in said aisle the aforesaid step and also in that the said defendant after the close of the said performance and before the plaintiff had reasonable time to leave the said theatre negligently suffered and permitted the above mentioned artificial lights which were necessary to a reasonable and proper lighting of the said premises to be turned down and extinguished and thereby caused the said premises to be and remain in a dark and improperly lighted condition; and that the said defendant further negligently permitted the said curtain to remain over the entrance to said passageway from said aisle.

By reason whereof the said plaintiff while using due care and caution on her part, in leaving the said box and going along the passageway on the said occasion in order to depart from the said theatre could not and did not see the said step immediately and after leaving the said passageway and was precipitated and thrown violently down the said step extending across the said aisle, to the floor of said theatre, while drawing the said curtain aside in order to allow a companion free access to said aisle from said passageway, and her body was much cut, bruised and

wounded; and she then and there suffered an impact fracture of the left femur and in consequence thereof her power of locomotion and nervous system are and will be permanently impaired, and her left leg is and will be permanently shortened; and the plaintiff was otherwise permanently injured both externally and internally and became and was and still is sick, sore, and lame, and has endured and will continue to endure great pain and bodily anguish; and has been and will continue to be, by reason of said injuries, hindered and prevented from performing and transacting her necessary affairs and business; and further the said plaintiff was forced and obliged to pay out a large sum of money, to wit, the sum of dollars in and about endeavoring to be cured of the injuries aforesaid, and in the expenses of medicine rendered necessary by reason thereof, and will in future be obliged to pay out large sums of money for the same purposes; to the damage, etc.

(Michigan)

That he is and has been for many years continuously, both before and since, 19..., a professional musician, proficient on the horn, flute, violin and especially a first class artist with the viola, and had been continually engaged in the practice of his profession, as a teacher, and playing with and leading bands and orchestras, at a very high pay, and was able to and did earn thereby from \$...... to \$...... per annum.

That the defendant,, is a private corporation, organized and doing business under the laws of Michigan, publishes the, and occupies and conducts its business in the stone front building known as the building, on the south side of boulevard.

That the defendant is the owner of the brick building known as the theatre, on the south of and known as numbers on said boulevard, being the building first west of said premises of, where he has for many years continuously both before and since said date operated and conducted a variety theater.

That on or about said day of, 19..., the, which has and had been for some time conducting a series of bulletins, to announce the results of public games and other interesting events and had been as well giving a series of "Open Air" concerts, through, an orchestra and band leader, hired and arranged with plaintiff and a considerable number of other musicians to give on the evening of said day one of said "Open Air" concerts.

That in connection therewith and for arranging therefore said secured an arrangement by agreement, whereby and whereunder the defendant agreed

to let it have the use of a balcony extending out and over the sidewalk in front of and immediately contiguous to the north side of said theater building of said, located next door west of said, in order to seat for said said musicians and for them to provide said concert therefrom.

That it became and was therefore the duty of said defendant and of said defendant, and of each of them, to provide for said musicians, including plaintiff, a place safe, convenient and comfortable for them to play at and upon, and to furnish said musicians there also a safe place and means, with convenient doors, entrances and stairways with sufficient railings thereon, and hallways, all well lighted or attended, both to get into and through said theater to said platform, as well as to get away therefrom and out of said theater; and that said defendants, and each of them, in so providing said balcony and inviting and permitting said musicians thereto and thereupon, held out and represented to plaintiff and said others that said doors, entrances, stairways, hallways, etc., leading into and out of said building were so as set forth sound and safe for ingress and egress.

That in accordance with said understanding between plaintiff and said and said and each of them, and the holding out and offering of and the said representations by said defendants and in relation to said premises, plaintiff and said musicians about o'clock in the evening of said day went up the stairway of said theater building, and thereupon went back through the room adjacent to and out upon said balcony, and gave said concert; that about o'clock of said evening, after they had concluded the concert, they crawled back through one of the windows into said theater building, went back through the room adjacent to the balcony and into which the windows opened, and the greater part of them went out ahead through the doorway thereof and found their way through the hallway, onto the stairs and went down into the street; that plaintiff remained behind, the only musician left in said room, put his French horn into the bag which he had therefor, after which he took the French horn under his right arm, and his music stand in his left hand and went out through the doorway, and upon reaching the hallway found it unlighted and dark; that he carefully felt his way from the wall up the short stairs that are at the left of the doorway going out, and passed across the hallway, carefully feeling his way to the approach erected at the head of the stairway leading down and out of said theater building; that he had never before been in the building or on the stairway, except while coming up that evening, when it was already past dusk and dark; that while coming up said parties noticed that the stairway and

hallway were unlighted; that they were talking to each other and plaintiff paid no particular attention while coming up to either the length, position or condition of the stairway or of the hallway; that therefore he was unacquainted with his surroundings and used extreme care in endeavoring to go out, walking carefully across said hallway to the east wall, felt his way along this right side and started carefully to descend said stairs; that after he had descended only two or three stairs, being unable to steady himself with his right hand, and finding no railing on that side, he turned partly around and started to cross over to the left side of said stairs, to ascertain if there were on that side a railing on which he might steady himself with his left hand, which was partly disengaged; that when (as he believes) plaintiff was about half way across the stairs, he became bewildered on account of the darkness, lost his bearings and sense of direction, slipped over the stair on which he walked and pitched down the stairway, fell on his left arm, side and head, broke his arm at the elbow, was knocked unconscious, and has no recollection of what further transpired until he returned to consciousness on the sidewalk in front of said theater, where he is informed that he had been carried by some one who found him unconscious after the fall; and plaintiff is informed that two or three of the other musicians who went on ahead of him stumbled on said stairs in going down, and that one of them pitched forward and down said stair and would have fallen and received a violent injury had he not been caught by the music director who was ahead of him.

And plaintiff alleges that by and through said accident his arm was severely fractured and splintered at the elbow and he received concussion of the brain and suffered great loss of blood; his body, arms and legs were skinned, bruised and contused; his abdomen was bruised, black and blue; and he was internally shocked, shaken and injured; his left eye and back were injured and his back was so lame that for a long time he could not walk; and his kidneys and bladder were so badly injured that for some time he was unable to urinate and became in danger of sepsis; and so on this account and because of his advanced age (.... years) his condition from said causes became too dangerous to permit an operation such as was required to properly bring said fractured arm back into its socket and restore it to its original form and condition; and that had it not been for plaintiff's previous good health he would have died; that in setting said arm it became necessary to draw it inwards and upwards, leaving part of the bone of the elbow projecting, and the arm has become stiffened and partially helpless; that plaintiff was confined to his room for weeks under continuous skilled medical attendance and nurses, and upon getting out was for a long time unable to walk without a cane; and that until

..... of that year he was continually under the care and advice of a skilled surgeon, endeavoring to get his arm re-formed and a better use thereof; that the sight in said injured eye is almost entirely destroyed, and he has been informed by skilled oculists that the optic nerves have been partially destroyed and that he will never regain his sight; that he suffered great mental and physical pain and anguish, and was put to great expense for medicine, medical attendance and appliances, nursing and additional care and for other and miscellaneous articles and things required and used by him in and about endeavoring to be healed and cured, and still suffers almost continual pain in both said injured eye and arm; that the arm is partially stiffened and he can bend the same up to within only inches from his mouth, on account of which he is unable to play any instrument other than the French horn, which he is obliged to hold almost wholly in his right hand while playing the same; that he has no trade or profession other than that of being a musician, and that the demand for French horn players is so small and his employment thereat so limited that his earning capacity has been through said injuries reduced to almost nothing.

And plaintiff alleges that contrary to their said duty and representations, the said defendants and each of them prepared, kept and left the said premises in the aforesaid condition, that they failed to keep said hallway and said stairway lighted, so that persons unacquainted with the conditions and surroundings could readily find their way over and through the same, and that they failed to have and keep some one in said hall or on said stairway, or in charge of said musicians to point out to them the conditions therein and thereof or to lead them into and out of said theater in safety, and failed to provide a railing along the east side of said stairway for persons so ascending or descending to steady themselves thereon; all of which was or ought to have been known to the defendants and each of them; and that the said premises being and having been left in said state were in a dangerous condition for use, such as was contemplated by plaintiff, of which plaintiff ought to have been informed or warned; which said omissions could and ought to have been prevented and the failure so to do constituted negligence of the defendants and each of them; and that on account of the said negligence of said defendants and each of them plaintiff so fell and was injured as aforesaid, without his fault; to plaintiff's damage of \$. ; wherefore he brings this suit.

1618 Street crossing, action

Those who are in charge of a street car must keep a sharp lookout as they approach a street crossing, and must slacken the

speed of the car sufficiently to enable them to have it under control to avoid injuring those who may be crossing the street.²³⁰

1619 Street crossing, Narr. (Va.)

For this, to wit, that heretofore, to wit, on the day of, 19.., and for a long time prior thereto, the said defendant was, and had been a common carrier of passengers for hire and reward, over and along a certain line of railway between the city of in the District of Columbia, and the city of, state of Virginia, the motive power whereof was electricity and the operation whereof was by electrical machinery and appliances, with certain stations or stopping places along its said lines for the taking on and discharging of passengers; that on the day and year aforesaid and for a long time prior thereto, it was and had been the custom, usage, and practice of the said defendant to provide and display a light, known, to wit, as a head-light, and other lights, on or from each of its said trains, so run as aforesaid, on its said line of railway, between the said city of in the District of Columbia, and the said city of, in the state of Virginia, whenever the said trains were run over or on the said line of railway during or in the night time, said lights being so placed and arranged as to be easily visible from the exterior of said train and sending a reflection for a long distance, to wit, to the distance of three hundred feet ahead; that the said defendant, being such common carrier of passengers, as aforesaid, on the day and year aforesaid, was engaged in the operation of a certain train of cars or coaches along its said line of railway from its station in the city of, District of Columbia, aforesaid, to the city of, state of Virginia, aforesaid, with said stations or stopping places as aforesaid, for the taking on and discharging of passengers as aforesaid, which said train of cars or coaches departed from the said station of the defendant company in the city of aforesaid, at a certain time, to wit, about o'clock P. M., it being the night time of that day, when the said plaintiff, at the special instance and request of the said defendant, became and was a passenger on said train of cars or coaches, to be carried on a certain journey, to wit, from the defendant's said station in the city of, District of Columbia, to a certain station or stopping place along the said line of the said defendant in the county of, state of Virginia, between the city of aforesaid, and the city of aforesaid, known, to wit, as ".....," for a certain fare and reward in that behalf paid to the said defend-

²³⁰ United Rys. & E. Co. v. Kolken,
114 Md. 160, 168, 171 (1910).

ant; that the said plaintiff, being such passenger, alighted from the said train of cars or coaches at the said station of "....." at which said station there is a public road crossing at grade; that in crossing the said defendant's tracks to get to the station shed, there being double tracks at that point, the said plaintiff was using the said public road crossing.*

That thereupon, it became and was the duty of the said defendant, its servants, agents and employees to provide and display a light, known to wit, as a head-light, or other lights as was its custom, usage, and practice, aforesaid, on each of its trains, running over or upon its said tracks or line of railway at that point at that time; but, notwithstanding its duty in that behalf, and wholly failing and refusing to perform or fulfil its obligations to the said plaintiff, and without any fault or neglect on the part of the said plaintiff, so negligently conducted itself, through its agents, servants and employees, that when the plaintiff was crossing the eastern track of the said defendant's said line of railway, at the said station or stopping place known as, a train operated by the said defendant, its servants, agents and employees not displaying any light or lights which were visible from the exterior of the train was allowed to strike the said plaintiff with great force and violence and to injure him as hereinafter set forth.

2. (Consider first count to star as here repeated the same as if set out in words and figures.)

And it also then and there became and was the duty of the defendant to use due, ordinary, and proper care to safely carry the said plaintiff along and upon the said journey and to safely land him at his destination; but the said defendant, not regarding its duty in this behalf, and wholly failing to use, due, ordinary and proper care, and without any fault or neglect on the part of the said plaintiff, so conducted itself through its servants, agents and employees, in this that, when the said train of cars or coaches had reached the said station or stopping place known as, in the said county of, as aforesaid, and the said plaintiff had alighted from the said train of cars or coaches, another train of cars or coaches, operated by the said defendant, through its servants, agents and employees, and running in an opposite direction to the one from which the said plaintiff had alighted and on the eastern track of the said defendant's line of railway, was so negligently run, by the said servants, agents or employees of the said defendant in that no head-light was displayed and whistle was blown, and said train of cars was allowed, without any fault or neglect on the part of the said plaintiff, and without any warning to the said plaintiff, to strike him, the said plaintiff, with great force and violence, and to injure him as hereinafter alleged.

3. (Consider first count to star as here repeated the same as if set out in words and figures.)

That thereupon it also became and was the duty of the said defendant, its servants, agents and employees, to use due and proper care to give reasonable warning to the said plaintiff of the approach of trains on its said tracks by providing and displaying a light or lights on its said train, so approaching the said public road crossing, said lights being so placed and arranged as to be easily visible from the exterior of said train, and sending a reflection for a long distance, to wit, two hundred feet ahead; but the said defendant, not regarding its duty in this behalf, and wholly failing and refusing to perform its obligation to the said plaintiff, and without any fault or neglect on the part of the said plaintiff so negligently conducted itself, through its servants, agents and employees, that when the said plaintiff was crossing the eastern track of the said defendant's said line of railway at the said station or stopping place known as "....." in the said county of, state of Virginia, it being in the night time, a train of cars or coaches operated by the said defendant, its servants, agents and employees, and not carrying or displaying any light or lights which were visible from the exterior of said train of cars or coaches, was so negligently run as to strike the said plaintiff with great force and violence, throwing him a long distance, and greatly injuring, wounding and crushing the body of the said plaintiff, and greatly injuring the said plaintiff in and about his head, back, spine, hips, legs and feet, thereby causing the said plaintiff great bodily suffering, injury and pain, so that the plaintiff has been prevented from following his usual occupation and preventing said plaintiff from obtaining a large sum of money which he otherwise would have obtained in and about his regular employment, and permanently injuring said plaintiff in his mind and body and causing said plaintiff to expend large sums of money in and about his efforts to be cured of his hurts, cuts, bruises and injuries, to the damage of the said plaintiff in the sum of dollars.

And therefore he brings his suit, etc.

1620 Streets and highways, action

Permitting uninsulated wires to remain in the public streets endangering persons passing along the same, renders a municipality liable for injuries caused thereby.²³¹ A municipality is not liable for an injury resulting from an obstruction of its

²³¹ *Palestine v. Siler*, 225 Ill. 630, 637 (1907).

streets by a licensee, unless the licensee performs a work in the street in an unusual and negligent manner with the municipality's permission after notice.²³² A municipality is liable for an injury which occurs from a defect in a street or highway which could have been foreseen and avoided by the authorities of the municipality by the exercise of ordinary care and prudence, and of which defect the municipality had actual or constructive notice. Whether a municipality had notice of the defect is a question of fact where there is a conflict of the evidence; it is a question of law where the facts are undisputed and but one reasonable inference can be drawn from them.²³³ A municipality is liable in damages to a person who is injured by a defect in the street while riding a bicycle; but ordinarily, this liability does not extend to injuries or damages sustained from a sharp stone, a tack, a bit of glass or coal happening to be in the road.²³⁴ A township is not liable for personal injuries sustained by a person while traveling in a highway, unless the township's negligence is the proximate cause of the injury.²³⁵ In Michigan a person's right to recover from a municipality for personal injuries sustained upon a street or highway is governed by statute and the right extends only to such injuries as are sustained by reason of any neglect to keep the ways in repair and in a reasonably good and safe condition fit for travel; it does not include accidents occurring from extraneous acts or neglect, such as snow, sleet and ice.²³⁶

1621 Streets defective, Narr. (Ill.)

For that whereas, the defendant, the city of, being a municipal corporation, before and on, to wit, the day of, 19.., was possessed and had control of a certain public street or highway known as street in the city of aforesaid, at, to wit, a point where said street is intersected with a certain other public street in the city of aforesaid, known as, to wit, street in said city of

And plaintiff avers that it then and there became and was the duty of the said defendant to keep the said

²³² Lockport v. Licht, 221 Ill. 35, 39 (1906).

²³³ Boender v. Harvey, 251 Ill. 228, 231 (1911).

²³⁴ Molway v. Chicago, 239 Ill. 487, 489, 493 (1909).

²³⁵ Bell v. Wayne, 123 Mich. 386, 390 (1900); Briggs v. Pine River, 150 Mich. 381, 387 (1907).

²³⁶ Miller v. Detroit, 156 Mich. 630, 633, 637 (1909).

street at or near the intersection of the said street in good and safe repair and condition, and to keep the same free and clear of holes and obstructions by or on account of which persons passing along and upon said highway might in any manner, while in the exercise of due care and caution for their own safety, be injured; but the defendant, not regarding its duty in that behalf, and while it was so possessed and had the care, custody and control of the said street or highway, to wit, street, at or near the intersection with said street, on, to wit, the day and date last aforesaid, at said place aforesaid, wrongfully, negligently and carelessly suffered and allowed said street or highway known as, to wit, street, to be and remain in bad and unsafe repair, and condition, in that the said defendant wrongfully, negligently and carelessly, for a long space of time immediately prior to the date aforesaid, to wit, for the space of months prior thereto, and on the date aforesaid, allowed and permitted a hole to be and remain in the said street at the place aforesaid, of great depth, of the depth of, to wit, inches, and of great width, of the width, to wit, of feet, and of great length, of, to wit, the length of feet, and so as to be in the way of and obstructing the passage of, and to endanger persons and vehicles passing along and upon the said street or highway and so as to endanger persons passing along, riding or driving upon the said street or highway at the place aforesaid, of all of which dangerous and unsafe condition of said street known as, to wit, street, the defendant then and there on the date aforesaid and for a long time previous thereto, had notice, or in the exercise of due care would have had notice.

And the plaintiff avers that on, to wit, the date aforesaid, he was riding, driving and passing along and upon the said street or highway known as street on a bicycle, in a northerly direction at or near the intersection of the said street with the certain other street known as street, with all due care and caution on his own part for his own safety, and by reason of the negligence of the said defendant, the bicycle on which the plaintiff was then and there riding then and there unavoidably ran and was unavoidably propelled into the said hole, and as the direct result of the negligence of the said defendant and then and there by reason of the premises, the plaintiff, who was then and there without any knowledge of the presence of the said hole in said street, was then and there precipitated to and upon the ground or pavement there with great force and violence and was then and there, by reason of the premises, greatly bruised, injured, wounded and hurt; and by and in consequence of said injuries so received, the said plaintiff then and there became sick, sore, lame and disordered, and

so remained for a long space of time, to wit, from thence hitherto; and by reason of the premises and as the direct result of the negligence of the said defendant as aforesaid, the plaintiff's left femur or hip and the bones thereof were then and there broken and fractured and the plaintiff received severe, serious and permanent injuries to his nerves and nervous system and was otherwise bruised and permanently injured in his left side, hip and leg and has suffered great pain and was prevented from attending to and transacting his ordinary business and affairs. Plaintiff further avers at the time when, etc., he was receiving large remuneration or earnings for his time and services, to wit, the sum of \$..... per day, and that by reason of the premises he has become unfit to further labor without great inconvenience and has suffered great loss of wages and will hereafter be prevented and deprived of such wages, and will suffer great loss and damage. And plaintiff avers that by reason of the premises he has been obliged to lay out and expend and become liable for large sums of money for physicians' and surgeons' services and for the expenses of nurses and medicines in endeavoring to be cured of the injuries so sustained by him as aforesaid, to wit, the sum of \$..... To the damage, etc. (Add averment of notice to municipality as in Section 1613)

(West Virginia)

For this, that whereas, before and at the committing of the grievances, wrongs and injuries hereinafter mentioned, there was a common and public highway or road running along the bank of river on the lower or west side of said river through a part of said city of and within the corporate limits thereof, in the said county of, intersecting street of said city, over, on and upon which said common and public road the citizens of this state and all others had the right to travel, pass and repass without hindrance or obstruction; and it was then and there the duty of the said defendant to put and keep that part of the said common and public road that was within the corporate limits of the said city of in good repair; yet, the said defendant well knowing the premises heretofore, to wit, on the day of, 19.., and for a long time previous thereto, at the county and city aforesaid, wrongfully and injuriously allowed and permitted that part of the said common or public road situated in its corporate limits to become and remain in bad condition, order and repair in this, that the said defendant allowed the said road to become sideling, and permitted a large rut to be worn in, along and across said public road at or near a sugar-tree, standing in or on the side of said road a short distance above the place the railroad crosses said public road, in the city and county aforesaid, and within the corporate

limits aforesaid; and by means whereof afterwards, to wit, on the day and year aforesaid, at the city and county aforesaid, the said plaintiff wife of the plaintiff, then lawfully riding, going and passing in, upon and along the said common and public road in and with a buggy to which one horse was attached and hitched, and on the sideling place aforesaid the said buggy slipped and slid, and the wheels on one side thereof fell into the said rut, whereby she, the said was then and there violently thrown out of said buggy, and then and there was greatly injured, bruised, wounded and crippled, and her life put in great danger and peril, to wit, at the city and county aforesaid. Wherefore, etc.²³⁷

1622 Sudden backing of street car, Narr. (Va.)

For this, to wit, that by decree of the court of the entered on the day of in the city of against and and others, the said and were appointed receivers of the said and were instructed to continue the operation of the said street railways: that said receivers were operating said railways under said decree on or about the day of; that by the order of the said court of the entered in said cause on the day of, the said plaintiff was granted permission to bring this action against said corporations and its said receivers.

That heretofore, to wit, on the said day of the said and, receivers, were operating said lines known as the and the lines, which lines are extended from what is known as in the county of eastwardly across to what is known as in said county and thence eastwardly by what is known as on said lines, and thence eastwardly to street in the city of; that upon said lines of street railway said receivers carried passengers for hire and reward to them in that behalf expended; all of which was done by said receivers under and in pursuance of the aforesaid decree of appointing them as such receivers.

And the said plaintiff avers that heretofore, to wit, on said day of the said defendants had a certain station on its said line near known as station, which station was the regular stop for passengers to get upon and alight from the cars operated by said defendants; that on the night of the day of she was standing at said station for the purpose of boarding one of the cars of said defendant's and duly and properly

²³⁷ Sheff v. Huntington (City), 16 W. Va. 307, 309 (1880).

notified the motorman in charge of said car that she desired to get upon the same, for the purpose of being carried as a passenger upon said car; and that thereupon it became and was the duty of said defendants, their agents, servants and employees to stop said car for the purpose of allowing the plaintiff to get upon the same.

Yet, the said plaintiff avers that the said defendants did not stop said car at said station, but negligently and carelessly ran said car by said station when said car stopped for the purpose of allowing the plaintiff to get upon the same; that thereupon she walked in the direction of said car for the purpose of boarding said car, when defendants, their agents, servants and employees in charge of said car, without any notice to the plaintiff and without any fault upon the part of the plaintiff, negligently, carelessly, and recklessly and suddenly ran said car back in the direction of the plaintiff and with such force and violence that the plaintiff was unable to get out of the way of said car, and negligently, recklessly and carelessly ran said car onto, upon and against the plaintiff; by reason whereof the plaintiff was knocked down, bruised, mangled, and lacerated, and the plaintiff's back and spinal column was seriously and permanently injured, and the plaintiff was made sick and sore; and the plaintiff had to expend and did expend a large sum of money, to wit, the sum of dollars in attempting to be cured of her injuries; and the said plaintiff was otherwise seriously and permanently injured and damaged to the damage of the said plaintiff of dollars.

1623 Sudden starting of meat chopper, Narr. (Mich.)

For that whereas, heretofore, to wit, on the day of, 19., plaintiff was and for some time prior thereto had been in the employment of the defendant as a butcher, and the defendant on the day and year aforesaid was and for some time prior thereto had been owning and operating a certain packing house in the city of, in the state and county aforesaid, at which said packing house the plaintiff was then and there employed as a butcher by the defendant as aforesaid and in and about which employment the defendant's employees were required to use certain machinery, also owned and managed by the defendant, and operated by steam power, among which machinery so owned and operated by the defendant was a certain meat chopper, which said meat chopper was operated by means of a belt running over loose and tight pulleys, and driven by steam power, and governed by a hand lever situated at or near the hopper of the said chopper. And while the said plaintiff was thus employed by the defendant as aforesaid, it became and was the duty of the plaintiff to use and operate this meat chopper

at the request of and whenever called upon by the defendant.

Plaintiff avers that the said chopper consisted of a hopper and attached thereto and extended at a right angle at one side was a cylinder, in which was inclosed a certain steel augur revolving at a speed of from two hundred (200) to three hundred (300) revolutions per minute, when running, which carried and drove the meat thrown into the hopper against and through certain plates attached to the front of the said cylinder by means of metal caps, fastened down with a set of screws, which said plates had holes drilled therein, through which the said meat was pushed and driven by the said augur of the said machine against a rapidly revolving knife, attached to the aforesaid augur on the further or outside face of the aforesaid plates, and it was customary and necessary to use a plate with certain sized holes for the first chopping, and then to change this plate for a plate with smaller holes for the second chopping, and then again for a plate with still smaller holes for the third chopping, and that all of these plates had to be changed by hand after the chopping was done and while the machine was not in operation; that after the meat had been driven through the said plate and any chopping operation was completed the plates became and were so tightly wedged into and against said cylinder that it was impossible to loosen and remove the said plates from the front of the said cylinder without pushing the same from the inside, and in order to do so it became necessary for the operator to insert his hand into the cylinder part of the chopper.

Plaintiff avers that on the said of, 19..., while he was thus employed by the defendant and was then and there working in the packing house of, and under the direction and control of the defendant, the defendant came and ordered and directed the plaintiff to run a quantity of beef and pork mixed, usually known as hamburger steak, through the said chopping machine, which said hamburger steak had to be run through the machine twice, first with a coarse plate and then with a finer plate, and after the said hamburger steak had been run through the chopper with the coarse plate it became and was the duty of the plaintiff to change the plates in the said chopper so that the said hamburger steak might be run through again with the smaller plate, and in order to thus change the said plates it became and was the duty of the plaintiff to insert his hand in the cylinder part of the said chopper in which the said augur was located, and the defendant, being well acquainted with the method of operating the said chopper, stood by watching, ordering and hurrying the plaintiff to get through with the said chopping, and while the plaintiff was then running the said hamburger steak through the machine with the coarse plate the defendant was then and there watching the chopping, and then and there took charge and control of the lever

by means of which the steam power operating and driving the said meat chopper was turned on and off.

And thereupon, it became and at all times and particularly on the day and date and at the time aforesaid, it was the duty of the said defendant when so taking charge and control of the lever by means of which the steam power operated and drove the said meat chopper, and particularly when this plaintiff was proceeding to change the plates and while in the act of loosening the coarse plate and while the said plaintiff was inserting his right hand into the said cylinder, to so operate, control and manage the said lever as aforesaid, and to so operate and manage it without negligence and with all due carefulness so that the power would not be turned on and said machine would not do great harm and damage to this plaintiff, and particularly while his hand was inserted in the said machine as aforesaid.

And plaintiff avers that when the coarse chopping of the said meat was done, defendant shut off the power, and thereupon, plaintiff, in the course of his employment, proceeded to change the plates and for the purpose of loosening the coarse plate inserted his right hand into the cylinder of the said chopper in which the augur part was located, and which said augur part revolves at the rate of 200 to 300 revolutions per minute when the power is on the machine, and while the plaintiff had thus inserted his hand in the said cylinder part of the machine containing the said augur and was in the act of removing the coarse plate, the defendant, without warning to the plaintiff and before the plaintiff had an opportunity to withdraw or extricate his right hand from the said cylinder, carelessly, recklessly, and with gross negligence and without due regard to the safety of the plaintiff, turned the stream power on to the said chopper, thus causing the augur part of the machine to revolve rapidly in the cylinder, and the plaintiff's right hand was caught in the said augur part of the machine and badly mashed and so much injured that it became necessary to amputate three fingers of his said right hand, and they were so amputated in consequence thereof, and he was by said injury caused great pain and suffering, and greatly deforming the said right hand and permanently disabling and injuring the plaintiff from earning his usual wages, to wit, about dollars per week, for months, and from earning full wages ever since that day, and from which injuries plaintiff has never fully recovered and is permanently injured.

Plaintiff avers that the said injuries to him aforesaid were directly caused by the defendant and by the reckless, careless and negligent manner in which the defendant operated the said chopper, and plaintiff himself was free from negligence in

respect to the cause of said injury, whereby an action has accrued to plaintiff and against defendant, to plaintiff's damage (\$.....) dollars.

Wherefore, he brings suit, etc.

1624 Sudden starting of street car, alighting, action

A passenger who is about to leave a car which has stopped at a crossing has a right to assume that it will not start until he has had a reasonable opportunity to alight from the car in safety, and if the car starts up suddenly and he has been injured, the sudden starting up of the car is actional negligence.²³⁸

1625 Sudden starting of street car, alighting, Narr. (D. C.)

For that heretofore, to wit, on the day of the defendant was a common carrier of passengers for hire, operating a line of street railway cars, propelled by underground electric power, on certain streets in the city of in the District of Columbia, and among others, on a portion of street from about the intersection of said street with avenue, eastwardly to the reservation, park or square in said city, commonly known as square, and passing around to the southward of said reservation, park or square and continuing eastward therefrom along said street; and on, to wit, the day of,, wife of the plaintiff became a passenger on one of the defendant's said cars, and paid the defendant the fair demanded of her, at the rate charged by the defendant, and became thereby entitled to be safely carried in said car to her destination and to alight therefrom safely.

And the plaintiff avers that while his said wife was proceeding in said car of the defendant in the vicinity of the said reservation, park or square, the defendant then and there stopped its said car for the purpose of allowing passengers to alight therefrom at or about the intersection of said street with street on the east side of said reservation, park or square in said city and District.

And it then and there became and was the duty of the defendant to permit the said wife of the plaintiff to alight from its said car in safety; and the plaintiff avers that the defendant was wholly unmindful and neglectful of its duty in that regard and its agents and servants in charge of the said car, in which the said wife of the plaintiff was riding, conducted themselves and operated said car so carelessly and negligently, that when

²³⁸ Moore v. Aurora, Elgin & Chicago R. Co., 246 Ill. 56, 60 (1910).

said car reached a point at or about the intersection of said street with said street, and after it had come to a full stop and while the said wife of the plaintiff was in the act of alighting therefrom, and before she had an opportunity to reach the ground in safety, said car was, by and through the negligence and carelessness of the agents and employees of the defendant in charge thereof, suddenly started forward, and by reason of such carelessness and negligence of the agents and employees of the defendant, she, the said wife of the plaintiff was thrown down and her clothing was caught by some part of said car or its attachments and she was dragged by said car while in rapid motion, for a long distance, to wit, along the said street for a large part of the distance between street and street, and her left knee was seriously and painfully bruised, strained, wounded and lacerated, and she was permanently lamed and injured and was otherwise greatly bruised, hurt and wounded; and by reason of her said injuries she was caused great pain, and suffering of body and mind from that time to the present, and will continue for the balance of her life to endure great suffering of body and mind; and by reason of said injuries her nervous system was and hath ever since continued and will hereafter ever continue to be, shocked, hurt and grievously impaired; and she has been permanently and seriously injured in her nervous system and in her bodily strength and health and rendered unable to perform manual labor or undergo any physical exertion, thereby rendering necessary to the plaintiff the care and medical skill of physicians and the personal attention of servants and nurses and of the plaintiff himself, upon and to the said wife of the plaintiff, and depriving the plaintiff of the services and the society of his said wife, for a long space of time, to wit, from the said day of hitherto, during which time the plaintiff has suffered great anxiety of mind and has been hindered from attending his lawful business and affairs.

And plaintiff avers that by reason of said injuries to his said wife, he, the plaintiff, has been obliged to expend and render himself liable for medical and other attention to her, his said wife, to wit, the sum of dollars in endeavoring to have her cured and healed of the injuries aforesaid.

And the plaintiff further avers that at the time aforesaid, to wit, on the day of the said wife of the plaintiff was and had been prior thereto in full possession of her physical and nervous health and strength and able to give, and she did give, her attention to the household and other duties in and about the home of the plaintiff and incident to her marital relations with him, but since the date aforesaid and by reason of the injuries aforesaid she has been and still

is unable to attend to the same, to the great damage of the plaintiff.

And the plaintiff further avers that by reason of the injuries aforesaid to his said wife, she became and was and still is sick and for the greater portion of the time confined to her bed and room, whereby the plaintiff has been and still is deprived of the society and companionship of his said wife, and likewise by reason of said injuries, her health has become so impaired that it has now become necessary to place her in a sanitarium for treatment thereby and to a more complete extent, further depriving the plaintiff of her society and companionship and subjecting him to great expense; and by reason of the said injuries to his said wife, the plaintiff will ever hereafter continue, so long as she shall live, to be put to great expense for medical and other attention and nursing for her, his said wife; all to his great damage.

(Illinois)

For that whereas, on, to wit, the day of, 19..., and prior thereto, the said defendant,, was a corporation duly organized and existing under and by virtue of the laws of the state of Illinois, and was engaged in the business of transporting passengers in street cars for hire in the city of, in the county of afore-said, and was possessed of divers cars which were propelled by electricity and were commonly known as electric street cars, and was also possessed of certain rails or tracks which were laid upon and along a certain public highway in said city of, to wit, upon street.

And the plaintiff avers that, on, to wit, said day of, 19..., and in the county aforesaid, the plaintiff became a passenger for hire upon one of the defendant's said electric cars, and then and there paid her fare as such passengers; that it then and there became and was the duty of the said defendant to exercise the highest degree of care and diligence in safely transporting the plaintiff as such passenger in its said car and over its said tracks along and upon said street in said city as aforesaid.

Yet, the plaintiff avers, that the said defendant wholly failed in its duty in that behalf, and by its servants then and there upon, to wit, said street, and at or near to the intersection of said street with street, operated, controlled or managed said car, upon which the plaintiff was a passenger as aforesaid, so negligently and carelessly and with such a want of due care for the personal safety of the plaintiff, that by reason of such negligence and want of due care by the defendant, the plaintiff, while exercising due care and diligence for her own safety, was thrown vio-

lently from said car to the ground, whereby plaintiff was severely hurt in the particulars hereinafter mentioned.

2. As a second count herein the plaintiff avers that after she became a passenger as aforesaid she signified to the conductor of said car her desire to alight from said car at the intersection of said street with street aforesaid, and said car was thereupon slowed down and came to a standstill, and plaintiff was thereby invited to alight therefrom; and plaintiff thereupon, with due care and diligence, was proceeding to alight from said car; that it thereupon became and was the duty of the defendant not to suddenly and without warning to the plaintiff start up said car while plaintiff was proceeding to alight therefrom and before plaintiff had been allowed a reasonable time to alight therefrom; yet, the defendant, not regarding its duty in that behalf, did suddenly and without warning to the plaintiff start up said car while plaintiff was proceeding to alight therefrom and before plaintiff had been allowed a reasonable time to alight therefrom, whereby and by reason of which negligence of the defendant, plaintiff, while in the exercise of due care and caution for her own safety, was thrown violently to the ground, whereby plaintiff was severely hurt and injured.

And in particular did break and fracture the bone of her left hip, and the plaintiff also sustained other great and severe injuries, and was otherwise greatly wounded, hurt and bruised, and suffered a violent shock to her nervous system, and became otherwise sick, sore and disordered, and remained so for a long time, to wit, from thence hitherto; and by reason of the injuries aforesaid said plaintiff suffered great pain and anguish, and was hindered and prevented from attending to her ordinary business and affairs, and was deprived of various profits and gains which she otherwise could and would have had; and said injuries are of a permanent character; and plaintiff will therefore be hereafter hindered and delayed from following her business and affairs as she otherwise could and would do; and the plaintiff was obliged to expend and did expend divers sums of money, to wit, the sum of \$....., in getting cured of her said injuries. To the damage, etc.

b

For that whereas, the defendant, on, to wit, the day of, 19.., in said county, was possessed of and using and operating a certain line of street railroad extending along avenue in the city of in said county, with certain cars or trains of cars running thereon for the convenience of passengers for reward, and the plaintiff, at, in said county, on said day became a passenger on a certain car or train of cars of the defendant being operated on said street railroad line on said

avenue in aforesaid, for a certain reward to the defendant in that behalf paid by the plaintiff; that the plaintiff was desirous of getting off of said car of the defendant of which he was riding where said avenue crosses street in said city, and signaled the conductor of said car to stop said car or train of cars at said street; that he had with him at that time his daughter, a child of, to wit, years of age, and that it was necessary for him to assist said child off of said train; that it then and there became and was the duty of the defendant upon the arrival of the said car or train of cars at aforesaid to give the plaintiff an opportunity of safely alighting therefrom and of helping his said child off of said car, and to stop a sufficient length of time, he being a passenger as aforesaid, to allow him to alight with safety from said car on which he was riding, and to take with him his said daughter; yet, the defendant did not regard its said duty or use due care in that behalf, but, on the contrary thereof, the said defendant by its servants caused the said car or train of cars to be stopped at or near the crossing of said avenue and street, for the purpose of allowing passengers to alight from said car or train of cars, and that while said car or train of cars was so stopped, and while the said plaintiff was using all reasonable care and caution to avoid the injury complained of, and while the plaintiff was attempting to alight with his said daughter from the said car, the said defendant, through its servant or servants, negligently and carelessly caused the said car or train of cars to be set in motion while the said plaintiff with his said daughter was so alighting therefrom, and thereby the plaintiff was then and there thrown with great violence from and off said car to and upon the ground, and upon certain rocks and stones, and upon a certain pavement covering the ground; by means whereof the said plaintiff was bruised, hurt and wounded and otherwise greatly injured, and as a result of such injury he became sick, sore, lame and disordered, and his health was seriously and permanently injured, and he became unsound in limb and body, and was obliged to, and did pay and incur, in endeavoring to be cured, large sums of money for physicians and medicines, to wit, the sum of dollars; and the plaintiff avers that previous to said injury, as aforesaid, plaintiff was and for a long time prior thereto had been a man in good health, and sound in limb and body, and for many years prior thereto had been in, to wit, the said county, engaged in the business of and out of which said business he was able to and did make large gains and profits, to wit, the sum of (\$.....) dollars a year; and plaintiff avers that on account of said injuries he was rendered incapable of attending to and carrying on said business, whereby he lost great

gains and profits, to wit, (\$.....) dollars; and he was otherwise seriously and permanently injured, and was obliged to and did pay and incur other large sums of money for nurses to take care of him while he was sick, to wit, the sum of (\$....) dollars. To the damage, etc.

c

For that whereas, on, to wit, the day of,, at, to wit, the city of, county of and state of Illinois, the defendant was a corporation duly organized under and by virtue of the laws of the state of Illinois, and was then and there possessed of and operating a line of street cars in the said city of, county and state aforesaid, for reward; that on the day and year aforesaid said defendant by and through its servants in that behalf was possessed of and was running a certain street car propelled by electric power, south upon its tracks along a public highway in said city, called; that at, etc., aforesaid, she then and there became a passenger upon said street car of the defendant to be carried, and was thereupon accordingly then carried in said street car from, to wit, the intersection of and to the intersection of and in aforesaid, for certain reward to the defendant in that behalf; that she notified the servants of the defendant that she desired to alight from said street car at

And thereupon it became and was the duty of said defendant, upon the arrival of said street car, at the south intersection of and, aforesaid, to give the plaintiff the opportunity of safely alighting therefrom, and then and there to stop the said street car a reasonable time to enable the plaintiff so to alight therefrom safely as aforesaid; yet, the defendant did not regard its duty, or use due care in that behalf, but on the contrary thereof, after the said street car reached the south intersection of and had sopped at said place, at the time aforesaid, and while the plaintiff with all due care, caution and diligence was then and there in the act of alighting therefrom, the defendant carelessly and negligently caused said street car to be suddenly and violently started and moved, and thereby the plaintiff was then and there thrown with great violence from and off the said street car and upon the ground.

By means whereof then and there the plaintiff sustained a fracture of the femur of the left leg which caused a permanent injury to the plaintiff, and she thereby has permanently lost the use of said leg; and she was otherwise greatly bruised, hurt and wounded and divers bones of her body were then and there broken; and she became and was sick, sore, lame and disordered and so remained for a long space of time, to wit,

from thence hitherto; during all of which time, she, the plaintiff, suffered great pain and agony, and was prevented and hindered from attending to her affairs and business; and thereby the plaintiff was obliged to and did then and there lay out large sums of money, amounting to \$....., in and about endeavoring to be cured of said injuries so received as aforesaid.

Wherefore, etc.

(Michigan)

For that whereas the defendant, before and at the time of committing the grievance hereinafter mentioned, controlled, managed and operated a certain street and interurban railroad extending from its station in the city of to its station at in said county of, and beyond, together with cars running thereon for the purpose of carrying and conveying persons and passengers in said cars from its said station in the said city of to its station at, and beyond for a certain toll, hire, and reward to be paid to the said defendant therefor.

And thereupon, heretofore, to wit, on the day of, 19.., at said station in the said city of, and while the said defendant so controlled, managed and operated the said railroad and cars as aforesaid, the plaintiff entered one of the said cars upon said railroad and became and was a passenger therein to be carried and conveyed by the said defendant upon the said railroad from its said station in the city of to its said station at aforesaid safely and securely for a certain toll, hire, and reward which she, the said plaintiff paid to the said defendant therefor, and the said defendant then and there received the said plaintiff within the said car as such passenger to be carried and conveyed as aforesaid and received the said toll, hire and reward so paid therefor by the said plaintiff as aforesaid.

And thereupon it then and there became and was the duty of the said defendant to safely and securely carry and convey the said plaintiff from its said station in the said city of to its said station at aforesaid in said car; and upon the arrival of said car at said station at aforesaid to stop the said car there and give the said plaintiff reasonable time and opportunity while exercising due care and prudence on her part to safely and securely alight therefrom to the ground; and to so control, manage and operate the said car by its servants and employees then and there in charge and control of said car as not to impel and throw the said plaintiff from the said car to the ground at its said station at aforesaid.

Yet, the said defendant by its said servants and employees who were then and there in charge and control of said car and acting under its orders and direction carelessly, negligently

wilfully and intentionally disregarding the said duties of said defendant in the premises then and there upon the arrival of said car at the said station at did not stop said car there and give the said plaintiff reasonable time and opportunity while exercising due care and prudence on her part to safely and securely alight therefrom to the ground; and did not so control, manage and operate the said car as not to impel and throw the said plaintiff from the said car to the ground at its said station at aforesaid.

But the said defendant by its said servants and employees so acting as aforesaid upon the arrival of said car at said station at aforesaid and as the said car was approaching near the said station slackened the speed of said car as it approached the said station and then and there at the said station, while the said plaintiff with all due care and prudence on her part was standing within the said car and near the rear doorway thereof through which it was necessary for her to pass in order to reach the rear platform of said car and the steps leading therefrom out of the said car to the ground, and while the said plaintiff with all due care and prudence on her part was standing there near the said doorway ready to pass from within the said car upon and over the said platform and steps of said car to alight from the said car to the ground should the said car be stopped at the said station to enable her to safely and securely alight therefrom to the ground there, and while the said car was still as aforesaid moving slowly along there, carelessly, negligently, wilfully and intentionally suddenly started and moved the said car forward with great, unnecessary and unreasonable force and swiftness, and with such force and swiftness as to impel and throw her, the said plaintiff, violently and swiftly out through the said rear doorway of the said car and off the said car to and upon the ground there at the said station at aforesaid with great force and violence and against the will of her, the said plaintiff.

And the said plaintiff avers that she was thereby without fault on her part carelessly, negligently, wilfully, intentionally and suddenly by the said defendant impelled and thrown from within the said car to and upon the ground at said station at aforesaid with great force and violence and against her will, while the said car was so moving there as aforesaid.

By means whereof the said plaintiff, who was theretofore sound and healthy and of good personal appearance, was greatly hurt, bruised, sprained and otherwise injured in her limbs and body. And the internal organs of the said plaintiff were bruised, sprained, torn, misplaced, ruptured and lacerated, and the said plaintiff was seriously, incurably and permanently injured internally. And the veins and surrounding tissues in the left leg of her, the said plaintiff, was ruptured,

distended, torn and lacerated, and the said veins were rendered varicose and incurable, and she, the said plaintiff, was thereby seriously and permanently injured in her said left leg and to a great extent has lost the use of the same. And the eyes of the said plaintiff were seriously and permanently injured and the sight thereof greatly dimmed and to a great extent destroyed, and the said plaintiff will lose the use and sight of her eyes and become wholly blind. And the whole nervous system of her, the said plaintiff, was thereby, and on account of said internal injuries, incurably and permanently injured. And the said plaintiff became and from thence hitherto has remained, and will permanently remain pale, worn, ill looking and dejected in her personal appearance. And the said plaintiff was otherwise hurt, bruised, and injured and became and from thence hitherto has remained and still remains sick, sore, lame, nervous, and disordered and has suffered great pain and is still suffering great pain in her mind and body. And during all the time since she was so injured and said plaintiff has been and still is by means of the said premises prevented and hindered from transacting and attending to her necessary and lawful affairs and business during all that time to be by her transacted and performed, and has suffered and is still suffering great mental and physical distress and hath been and is much injured and damnified. To the damage, etc.

(Virginia)

For this, to wit, that heretofore, to wit, on the day of, 19.., and at divers other times before and at the time of the commission of the grievances hereinafter mentioned, the said and were the receivers of the circuit court of the United States for the district of Virginia, in the suit of company v. company, et als., and as such were in the possession of and were the operators of a certain street railway in, along and upon the streets of the city of, and also of certain electric cars propelled by electric currents as the motive power thereof, which the said defendants ran and operated along, over and upon the said street railway and the tracks thereof, and which said cars the said defendants operated by its servants, agents, and employees, called conductors and motormen, and the said defendants became and were in the operation of said cars a common carrier of passengers for hire and reward, in and upon said electric street cars, so operated upon the streets aforesaid.

And on the day and year aforesaid, the said plaintiff, at the special instance and request of the said defendants, boarded and got upon one of the said cars, which was in the custody, control and management of the servants, agents and employees

of the said defendants, to wit, a certain conductor and motor-man, whose names are to plaintiff unknown, at a point in said city on street, and desired to be carried and conveyed as a passenger thereon to a point on said street near street, where she wished to alight, and which is a place where said cars, and particularly the car aforesaid, usually stopped to take on and let off passengers, and said plaintiff paid the usual fare demanded of her by the defendants' said servants, and became and was a passenger as aforesaid.

And thereupon it became and was the duty of the said defendants to use due and proper care, skill and diligence in transporting and carrying safely the said plaintiff, and upon being requested, notified or signaled so to do, to stop its said car at said point and to allow the said plaintiff sufficient time to safely land and alight from the said car.

Yet, the said defendants, not regarding their duty in that behalf, did not use due and proper care, skill and diligence for the safe carrying, landing and alighting aforesaid of the said plaintiff, but wholly neglected the same and with gross negligence and in utter disregard of its said duty to the said plaintiff, after the said plaintiff had requested the conductor to stop said car at said point and the usual and customary signal had been given to stop the said car at the point aforesaid, the said defendants, by their said agents, caused the said car to be slowed up for the purpose of stopping at said point, and after having stopped the said car, or so nearly stopped the same, at said point as to permit the plaintiff to alight therefrom with safety, the said defendants, by their said agents, negligently, carelessly and recklessly started the said car off and put the same suddenly in rapid motion, to the surprise of the said plaintiff, without any warning or notice to her, and while she was, as was well known to said agents in charge of said car, in the act of getting ready to alight from the same, she, the said plaintiff, having then and there risen from her seat and then and there standing in said car waiting for the same to come to a full stop, and believing, as she had a right to believe, that the same was about to come to a full stop, she, the said plaintiff, then and there exercising due care and caution in so getting ready to alight from said car.

And the plaintiff avers that while she was so standing in said car, by reason of said hasty, sudden, negligent and wrongful starting of said car and putting the same in rapid motion by the said defendants, by their said servants, agents and employees, without giving said plaintiff time to safely alight and land from said car, and without notice to her, she, without fault on her part, and solely by reason of the said negligent acts of the defendants, was thrown suddenly, precipitously and violently from said car, so wrongfully and negligently put in motion as aforesaid, into and upon the said street, and was

greatly bruised, wounded, injured and hurt, and made sick and sore in and upon her head, back, limbs, etc., and was otherwise greatly wounded, injured and damaged (the said plaintiff being then and there three months gone in pregnancy, and suffered in the eighth month of her pregnancy a premature birth of a child, which said child was born with defective vital organs and within two months after its birth died, all of which was directly caused by and came about by reason of said negligence), none of which would have happened but for the aforesaid negligent acts of said defendants; by reason of which premises the said plaintiff has suffered great pain and has been ill, sick and sore, and on account of said sickness and injuries has been forced to expend large sums of money in and about endeavoring to be cured of said sickness and injuries, caused as aforesaid. To the damage, etc.

1626 Sudden starting of street car, boarding, Narr. (Ill.)

For that whereas, on, to wit, the day of, 19.., in the county aforesaid, the defendant was possessed of and using and operating a certain railroad extending through a part of the city of in said county, and through the towns of and in said county and other parts of said county, with certain cars and trains of cars thereon, for the conveyance of passengers for reward; and on, to wit, the day aforesaid, in the county aforesaid, the defendant was a carrier of passengers for hire in and by certain street cars which said defendant propelled along and upon its tracks on a certain street, to wit, street so-called, to wit, in the county aforesaid. That it was the duty of said defendant for hire to receive and take on board its said cars persons as passengers; and on, to wit, the day last aforesaid, a certain car of said defendant was passing along said street, to wit, said street, so called, for the carriage of passengers therein, and said plaintiff signaled to the servants of said defendant who had charge of said car to receive said plaintiff as a passenger on said car, and said servants of said defendant in response to said signal checked the speed of said car to a point where it was safe for said plaintiff to get upon said car and become a passenger thereon; and said servants of said defendant thereupon invited said plaintiff to get upon said car while it was so in motion; and thereupon said plaintiff then and there, without fault or negligence on his part, attempted to get upon said car and could have and would have safely got upon the same if the speed of said car had not been increased, and it was the duty of said defendant not to increase the speed of said car until said plaintiff had got upon said car; but said defendant, not mindful of its duty in that regard, carelessly and negli-

gently and wilfully and purposely, while said plaintiff was, without fault or negligence on his part so in the act of getting upon said car, started said car forward suddenly and violently at a much higher rate of speed than the same was going when the plaintiff started to get upon said car; and thereby then and there, by the sudden moving of said car forward, threw said plaintiff, without fault or negligence on the part of the plaintiff, to and upon the ground there and dragged the plaintiff a great distance, to wit, feet, and greatly bruised, mangled and injured the plaintiff so that his life was thereby then and there greatly despaired of; and thereby then and there the right hand of plaintiff was crushed, broken and cut off; and thereby then and there the right arm of plaintiff was bruised, crushed, broken and wounded. By means of which said several premises the plaintiff became, has ever since been, and will permanently remain in the future, sick, sore, lame, disordered and weak and unable to work and carry on his business and affairs; and whereby his whole body was seriously shocked, bruised and lamed and his clothing torn and destroyed; and whereby also he was mentally frightened and shocked; and the plaintiff has suffered great and excruciating pain, and will permanently in the future suffer such pain. And thereby then and there, by means thereof, the plaintiff became and was unable to work and carry on his special trade of cabinet maker, and from thence hitherto has been unable to carry on his said trade and will be permanently so prevented in the future. And also by reason of the premises the plaintiff has been and is otherwise greatly injured and damaged, to wit, at the county aforesaid. To the damage, etc.

b

For that whereas the defendant, S, a corporation, heretofore, on, to wit, the day of, 19.., at, to wit, the county and state aforesaid, was the owner of a certain street railway in, and upon and along a certain street known as R street, in the city of, county and state aforesaid, and being so the owner of said street railway, on, to wit, the day aforesaid, at, to wit, the place aforesaid, said defendant last named suffered and allowed the defendant, D, a corporation, to maintain and operate certain cars for the conveyance of passengers for reward to the said defendant, D, upon and along said street railway as aforesaid.

And the plaintiff avers that, on, to wit, the day aforesaid, at, to wit, the intersection of P avenue with said R street in said city of, and upon which said defendant D maintained and operated said street railway, and its said cars thereon as aforesaid, the plaintiff attempted to become a passenger and to board one of the cars of the defendant, D, so operated as aforesaid, which said car was then stationary at

the said intersection of P avenue and R street for the purpose of receiving passengers; thereupon it became and was the duty of the defendant, D, to afford the said plaintiff a reasonable opportunity to board said car as aforesaid in safety; but the plaintiff avers that the defendant did not regard its duty in that behalf, and did carelessly and negligently cause the said car which the said plaintiff, who was then and there exercising all due care and caution for her own safety, was then and there in the act of boarding, to be suddenly and violently started and moved, thereby causing the plaintiff to be thrown with great force and violence upon and against the side of said car and then and there injured.

By means of the committing of the said injury by the defendant, D, to the said plaintiff as aforesaid, then and there the spine and nervous system of the said plaintiff was bruised, hurt, shocked and wounded and certain of her pelvic and abdominal viscera were deranged and injured, all of which shock, bruise, derangement and injury were then and there permanent to the plaintiff; and the plaintiff was otherwise greatly bruised, hurt, shocked and wounded; by means whereof the plaintiff was obliged to and did then and there lay out divers sums of money, amounting all to, to wit, the sum of (\$.....) dollars, in and about endeavoring to be cured of said injury so received as aforesaid; and also by reason of the premises, the plaintiff then and there became and was sick, lame and disordered and so remained for a long time, to wit, from thence hitherto, during all of which time the plaintiff suffered great pain and agony and was and is hindered and prevented from transacting and attending to her business and affairs, and lost and was deprived of divers great gains and profits which she might and otherwise would have made and acquired. Wherefore, etc.

1627 Sudden stopping of street car, Narr. (Mich.)

For that whereas, the defendant, on or about the day of, 19.., at the city of, in the county of, and state of Michigan, was a street railway corporation, owning and operating a certain system of city and suburban electric railway, among which was what is commonly known as the avenue line, avenue line, crosstown line and many other lines, having its principal office at number avenue in the city of, in the county of aforesaid, and having many other lines of railway in the city of, and suburban lines, and operating cars propelled by electric power on all of its said lines and systems of electric railway, for the purpose of carrying and conveying passengers to and from place to place in said city of, and also between the cities,

villages and hamlets on its said suburban lines, for certain reward, all of which of its said cars were in the charge of its servants and agents, and the said defendant was then and there, at said city of, by said avenue line and other lines a common carrier of passengers for reward, the said avenue line commenced at the city limits on avenue and extended southerly on avenue, next easterly on avenue, westerly on, then southerly on street, and run and extended over many other lines of street railway, among which were avenue,,,, and other streets and avenues.

And the plaintiff avers that on the day and date aforesaid at the city of aforesaid, and at the intersection of street and said avenue in said city of, at the special instance and request of the said defendant, she became and was a passenger on one of the certain electric cars of the said defendant, on what was commonly known as the avenue line aforesaid, and which said car was then and there being propelled and operated by the servants of the said defendant in a southerly direction on said avenue or street, to be carried in a southerly direction toward the city hall; and the said plaintiff then and there for certain reward was received as a passenger and entered upon said car to be transported in a southerly direction as aforesaid, for certain reward then and there by her to the said defendant duly paid.

And the plaintiff avers that by reason of the premises it then and there became the duty of the said defendant, by its said servants in charge of said car, to use due care, diligence, vigilance and skill in operating said car upon which plaintiff was a passenger, and to safely carry and convey the said plaintiff from said avenue southerly to her destination, and to safely deliver her at the end of her journey; and the plaintiff further avers that said car had its aisle on the right hand side of the car, and long seats extending to the left across the car; that when she entered the car as a passenger the seats were all filled and many passengers were standing in the aisle of said car, and the plaintiff and her companions were obliged to stand also; that the railway tracks of the said defendant at said place and between said avenue and avenue were very much out of repair and very rough and uneven, and the car rocked to and fro violently while she was obliged to stand up therein, and she found great difficulty in remaining upon her feet while said car was in motion; and therefore, by reason of the premises, she charges that it was the further duty of the defendant, by its servants, to exercise additional care and precaution in operating said car and in starting and stopping

the same, and to desist and refrain from operating said car with great speed, or starting and stopping the same very suddenly, and with great force and violence.

Yet, the said defendant, by its servants, did not regard said duty or duties, or any or either of the same, and wholly disregarded each and every of the same, and did not use due care, vigilance, diligence, caution and skill in operating and running said car upon which plaintiff was a passenger, but carelessly, recklessly and negligently ran and operated said car with great speed; and the servants of the said defendant so in charge and management of said car, for and on behalf of said defendant, while in the employ of said defendant, and while acting within the scope of their employment, so carelessly, wantonly, recklessly and negligently managed and operated said car upon which plaintiff was a passenger, and so suddenly stopped, the same, at avenue, that plaintiff was thrown off her equilibrium and off her feet and struck her body in manner aforesaid, and was injured as hereinafter more fully set forth.

And the plaintiff avers that by reason of the premises and in consequence of the condition of the track, the condition of the car, the speed with which the car was operated, and the violence and suddenness with which it was stopped, by the servants of the said defendant, the plaintiff was thrown against the car, seats and other obstructions and other passengers, and thereby and therefrom received a most severe physical shock and a severe and violent nervous shock, that the left side of her body just below the left breast struck against the corner of the seat or back of the seat, fracturing two or three ribs, bruised her breast, dislocated the thumb of her right hand, injuring the same permanently, and also inflicting other injuries upon the breast and spine, and nervous system from which plaintiff has since continually suffered pains in the back, and in her head; and the plaintiff in consequence of said injuries became, and still is and will in the future be sick, sore, lame and disordered, and an invalid, although she had prior to the time of the receipt of said injuries, been a strong, healthy woman, and was able to do all of her own work.

And the plaintiff further says that she was at the time in a pregnant condition, and that said physical and nervous shock brought upon her premature pain and premature birth of a child, causing her to suffer much additional pain on account of the matters last aforesaid, and in consequence thereof, she became sick, sore and disordered and so continued to be and remain from thence hitherto, and is unable to state when she will recover from the consequence and effects thereof.

And the plaintiff avers that the injuries to her thumb, spine, side, back and nervous system are of a permanent character,

that she has suffered much pain and distress, physical and mental from said time to date, and still suffers and must in the future suffer like pain and like disability, and that she has been otherwise greatly damaged and injured. To her damage, etc.

1628 Switch defective, Narr. (D. C.)

For that whereas, heretofore, to wit, at the time of the committing of the grievances hereinafter mentioned, each of said defendants was engaged in business in the District of Columbia as a common carrier, and as such common carriers said defendants occupied and used certain railroad tracks on street northwest, and avenue, in the city of, District of Columbia, and operated on and over said tracks certain steam locomotives and railway cars for the carriage of passengers; and whereas, on, to wit, the day of, the said was a locomotive engineer in the employ of the defendant, and as such engineer under such employment was in and upon and was in charge of a locomotive belonging to said, which said locomotive was propelling a train of passenger cars from the railway station in the city of, District of Columbia, known as street station southwardly and on said street northwest to avenue and thence by means of a switch and its appurtenances forming a part of said track turning into said avenue southwardly toward the river.

It thereupon became and then and there was the duty of the defendants, and each of them, to keep said tracks and switch and their appurtenances in good and safe repair and condition; but the defendants and each of them neglected their duty in that behalf, in consequence whereof and while said was so engaged in his said employment the locomotive of which he was then and there in charge as aforesaid was derailed and overturned at or near the intersection of said street, northwest and the said avenue, whereby said was then and there grievously injured; of which injuries said thereafter, to wit, on the same day died.

And the plaintiff avers that said engine was so overturned and said was so killed while he, the said was exercising due care and diligence on his part, and in consequence solely of the negligence of the defendants, and each of them, in failing to maintain in good and safe repair and condition said switch and its appurtenances in this, that a certain guard-rail which formed a part of said switch and its appurtenances had become so worn from long continued use and was so insecurely fastened in place where it

was located that it could not and did not perform its proper function while said locomotive was so passing over said switch, and also in this, that said track and switch and their respective appurtenances were otherwise in an unsafe and improper condition.

And the plaintiff avers that the said when he was so killed left him surviving a widow and children, years of age, all of whom are still living.

And the plaintiff further avers that thereafter, to wit, on the day of, the plaintiff was appointed administrator of the estate of said deceased, at the place of the domicile of said, by the court of in the state of; and that the plaintiff immediately thereafter duly qualified as such administrator and entered upon the performance of his duties as such.

In consequence of all and singular the premises the said widow and children of said deceased have sustained a pecuniary injury from his death to the amount of over dollars, and under the statute in such cases made and provided an action has accrued to the plaintiff as administrator as aforesaid, against the defendants and each of them, to recover from them, and each of them, the sum of dollars. Wherefore, etc.

1629 Switching, statute, violation

A statutory provision requiring an engineer who approaches with a train a crossing of two or more railroads to make a full stop, has no application to switching-yards belonging to the same railroad company.²³⁹

1630 Switching, negligent, Narr. (Ill.)

For that whereas the said defendant,, is a railroad company organized under the laws of the state of Illinois and is a common carrier and on, to wit, the day of, 19.., and for a long time prior thereto, owned and possessed and operated a certain pair of tracks known as the main tracks of the said railway company, running in an easterly and westerly direction through the city limits of the city of, county and state aforesaid, which said tracks were used for the purpose of running, hauling and transferring thereon passenger and freight traffic; and whereas, also, the said railway company, defendant, on the day aforesaid and for a long time prior

²³⁹ St. Louis National Stock Yards
v. Godfrey, 198 Ill. 288, 292 (1902);
Par. 75, c. 114, Hurd's Stat. 1909.

thereto owned and possessed and used and operated, maintained and controlled a certain switch track or switch tracks connecting with and adjoining to the said main tracks of the said railway company, the defendant, at a point about south of the factory premises of the W, located in the city of aforesaid, which said switch tracks ran in a northerly direction from the said main tracks into and upon said factory premises of the said W which said switch track or switch tracks were on the day aforesaid, and for a long time prior thereto, used, operated, controlled and maintained by the defendant railway company for the purpose of hauling, transferring and conveying loaded and empty box cars and freight cars owned by the defendant railway company into and from the said factory premises of the said W by divers locomotive engines, owned, operated and controlled by the defendant railway company and under the care and management of then divers servants of the said railway company; and whereas, also, the said defendant railway company was authorized and licensed on the day aforesaid and for a long time prior thereto by the said defendant W to place and maintain the aforesaid switch tracks on its said factory premises and to run, operate and haul its cars over, along and upon said switch tracks upon said factory premises for the purpose of switching coal cars in and to the cement works of the said defendant W and for the further purpose of hauling in its said cars from the said cement plant of the said defendant W its manufactured cement products, and for other purposes.

And whereas, on the day aforesaid, and for a long time prior thereto, the said switch tracks of the said defendant railway company, so running into and upon the said factory premises at and from a point about, to wit, feet north of the said main tracks of the defendant railway company, consisted of two tracks or double tracks which run practically north and south and parallel to and in close proximity to each other, to wit, about feet apart; the more westerly of the said switch tracks being laid and located close to and near, and on the east side of, the certain cement warehouse then and there being used by the said W for the purpose of storing and loading cement and the said freight cars or box cars of the defendant railway company when being filled and loaded with the product of the said W, preparatory to shipping the same, were backed or shoved in and upon the said more westerly switch track, all of which facts were well known, or by the exercise of due and reasonable care could have and would have been known, to the said railway company, defendant.

And whereas the defendant W on the day and year aforesaid, and for a long time prior thereto, was the owner and operator of a certain manufacturing plant fully equipped for the manufacture of Portland cement, in the county and state aforesaid, and in active operation, and employed in and about

its said factory plant in the operation thereof more than men; and in the line of their employment and in the performance of their duties in and about said factory and in and about said factory premises, said men were compelled to, and did, on the day aforesaid, and for a long time prior thereto, work in and about the said cement warehouse, and the said switch tracks of the defendant railway company, all located as aforesaid, all of which was well known to the railway company, or by the exercise of due and reasonable care could and would have been known to the said railway company. And whereas, on said day and year, and for a long time prior thereto, the plaintiff was in the employ of the defendant W as a common laborer in and about its said plant, and by virtue of said employment it became and was the duty of the plaintiff to perform such manual labor as he might be directed or instructed to do by the said defendant W; and whereas, the said defendant W, on the day aforesaid, had and used at its said plant the said building known as, and commonly called, a warehouse for the storage of cement; and whereas said W used in connection with its said plant and located on its said factory premises the aforesaid railroad tracks or switch tracks connecting with the main railroad tracks of the defendant railway company, and leading away therefrom, into and upon the said factory premises of the said defendant W to and along the east side of the said cement warehouse and to other parts of the said factory premises.

And whereas, the plaintiff, while in the line of his duties, was instructed by one, the foreman of the said defendant W on the day aforesaid, and while it was dark or dusk, together with certain other laborers of said cement plant, to move, shove or push to one of the doors of the said cement warehouse for the purpose of loading said car with cement, an empty railroad car, which car was standing on one of said switch tracks on the premises of said cement plant, a short distance away from the said door of said cement warehouse, which said fact the railway company well knew, or by the exercise of due and proper care and caution could have and would have known.

And whereas, the plaintiff did, pursuant to the orders of the said, the foreman of said defendant W in conjunction with certain other laboring men of the defendant W move, shove or push said railroad car which had been standing as aforesaid on one of said switch tracks to one of the doors of said warehouse while the machinery of the factory was in motion and making a great noise; and it was then and there the duty of the plaintiff to hold said empty car at said warehouse door until the other said employees who were working with the plaintiff, as aforesaid, would have blocked the wheels of said car to hold the car stationary while said car would be filled with said cement product.

And the plaintiff avers that it then and there became and was the duty of the said railway company to so use, operate and control the said east switch track, which was parallel with and in close proximity to, the said west switch track in and about which the plaintiff was at work, as aforesaid, so as to avoid injury to the plaintiff and to haul, transport and switch its said freight cars or box cars over, along and upon the said east switch track with reasonable care and caution so as to avoid injury to the plaintiff and to that end then and there have upon said cars, so being hauled, transported or switched over said east switch track, a competent and careful person to guide and regulate the speed thereof and to give warning of the approach of the same; yet, disregarding its duty in that behalf, the said railway company on the day aforesaid, then and there, at the place aforesaid, carelessly, negligently and recklessly switched, backed, shoved or pushed a certain coal car, heavily loaded with coal, which was then and there the property of the defendant railway company, and under the control and management of its then servants, who were not fellow-servants of the plaintiff, in, along, upon and over the said east switch track so located as aforesaid, at a high and excessive rate of speed and at a time when it was dark or dusk and the machinery of the said cement works was in full operation and making a great and loud noise, with no competent person or anyone upon the said coal car so heavily loaded with coal, to guide the same or regulate the speed thereof or to give warning of the approach of the same; by means whereof, and on account of the negligent, careless and reckless conduct of the said railway company, the plaintiff, who was then and there working in the line of his employment and while in the act of moving away from the said freight car so being placed or "spotted" by him as aforesaid, and while exercising due care and caution for his own safety, was thereupon struck by said heavily loaded coal car of said railway company and knocked and felled to and upon the ground there; and the plaintiff avers that at the time that he was struck, as aforesaid, he did not know that the said moving coal car was upon the said east switch track nor could he have discovered the said moving coal car by reasonable care on his part in time to avoid being struck by the same; and then and there plaintiff was, by reason thereof, severely bruised, and lacerated and severely injured as hereinafter alleged.

2. It thereupon also became and was the duty of W, one of the said defendants, to furnish the plaintiff a reasonably safe place in which to do his work and to furnish lights, and to properly light the place where said plaintiff was working; and it was then and there the duty of the said defendant W, to require and take care that the said railway company, the

other of said defendants, would exercise reasonable care in moving its cars on said switch tracks, and to have competent persons in charge of its cars while moving same on said switch tracks, and to place a light when it was dark upon the front end of its cars while moving over said switch tracks, and to warn said plaintiff of the approach of said cars while moving or switching the same; and it was the duty also of the defendant railway company to exercise reasonable care in moving and switching its said cars on said switch tracks and to have competent persons in charge of its cars while moving and switching same on said switch tracks, and to have lights on the front end of its cars while moving on said switch tracks when it was dark, and to warn said plaintiff of the approach of its said cars; yet, wholly regardless of their duties in that respect, the said defendants while the said plaintiff was in the line of his duty after having assisted in moving said car and holding said car as aforesaid, and while about to move away from said car after holding same for the purpose of blocking as aforesaid, at the time aforesaid, negligently and carelessly pushed, shoved and moved a car heavily loaded with coal down, along and upon a certain switch track running parallel with and close to the said switch track upon which said plaintiff was working as aforesaid, without any person in charge of said moving loaded car and without a head-light on said moving loaded car, and without any lights in the place where plaintiff was working, although it was dark or dusk there, and without giving the plaintiff any warning of the approach of said loaded car, and while the plaintiff was working in the line of his duty as aforesaid, pursuant to orders given by the said foreman, under the control, guidance and direction of the W, defendant, and while in the act of moving away from said empty car which he had been holding for the purpose of blocking, and while exercising due care and caution for his own safety, said coal car heavily loaded with coal, then and there struck the plaintiff upon his back and right side and felled him to and upon the ground; and the plaintiff avers that at the time he was struck as aforesaid, he did not know that there was any moving car on said switch tracks, nor was he informed of any moving car by anyone on behalf of either of the defendants, nor could he have discovered the said moving car which struck him as aforesaid, by exercising reasonable care at the time aforesaid, in time to avoid being struck, as aforesaid.

And then and there the plaintiff was by reason thereof seriously and permanently injured, and by reason thereof his lungs, spinal column, kidneys and intestines were severely injured, and he was bruised and lacerated, by reason whereof he became and was affected with traumatic pleurisy, as a direct result thereof, and thereby the plaintiff was compelled to and did lay out divers large sums of money amounting to

..... dollars in and about endeavoring to be healed of his said injuries, so received as aforesaid; and also by means of the premises, plaintiff then and there became and was sick, sore, lame and disordered and so remained for a long time, to wit, from thence thitherto, during all of which time the plaintiff suffered great pain and has been hindered from transacting his business and affairs and has lost and been deprived of divers large gains and profits which he might and otherwise would have gained and acquired; and the plaintiff avers that his said injuries are permanent. To the damage, etc.

(Virginia)

For this, to wit, that heretofore, to wit, on the day of, 19.., and at the time of the grievances hereinafter mentioned the said defendant was the owner and operator of a certain steam railroad running through the state of Virginia, its line terminating at the, Virginia, in which said city said defendant owned and operated a certain railroad yard, made up of many tracks, over, about and on which yard it propelled its steam trains, cars, and engines for the purposes of making up and disconnecting its trains, shifting its cars, trains and engines, and loading and unloading freight, and doing those things usual in railroad yards, the said yard terminating on river where defendant owned and operated its certain docks and piers; and the plaintiff avers that on said date, at the special instance and request of said defendant, the said plaintiff became and was the hired servant of the said defendant, being in the employ of the defendant and directed and required by it to work in and upon its railroad track and line and to replace and repair the same for a certain wage in that behalf paid to plaintiff by defendant, and especially was plaintiff employed by defendant, on said date, to repair a certain railroad switch of the defendant's located in the aforesaid railroad yard, situated about opposite the easterly end of street where it is cut off by the said yard, the two tracks forming the said switch extending therefrom to on river and to, so that defendant by means of said switch runs and shifts its trains, engines and cars to said and to said; and the plaintiff avers that on said day and date aforesaid he was engaged in his said duty of repairing the aforesaid switch, which was then out of order; and that it thereupon became and was the duty of the defendant to use due and proper care to furnish and provide plaintiff with a safe place to work, and to exercise like care not to injure said plaintiff; and especially was it defendant's duty to exercise due and proper care in abstaining from running its yard engines and trains against and upon plaintiff; and the plaintiff avers that on said date a certain yard engine of the

defendant, operated and controlled by defendant's employees, approached said switch from the west and desiring to go over said switch and on and over the track which extended therefrom to, as aforesaid, the said plaintiff so spiked and temporarily fixed the said switch as to allow the said yard engine to pass over the same and to go upon its said journey as aforesaid; and the plaintiff avers that of the fact that the said switch was out of order and that plaintiff was engaged in repairing and mending the same and that the said yard engine should not pass over the same until directed so to do by the plaintiff those in charge of and operating the said yard engine were well informed and knew, and they also knew that the provision made by said plaintiff at said switch for the purpose of permitting said engine to pass over the same was of a temporary character, intended only to permit said engine to pass down said track to said And the plaintiff avers that the said yard engine passed over said track to said, and there, after hitching to several railway cars, started back, with the engine in front, over said track towards the said switch, in order to shift the said cars and engine from said track, to some other location in and upon the said railroad yard; and the plaintiff avers that the said defendant, not considering its duty in the premises, but expressly, negligently, wrongfully and wilfully failing and refusing to perform the same, carelessly, wrongfully, wilfully and negligently ran the said yard engine with the said cars thereto attached, in charge of and operated by its employees, from said over the said track extending therefrom, as aforesaid, into and upon the said switch, and negligently, wrongfully, wilfully and carelessly failing to keep any reasonable and proper watch or look ahead, and without ringing the engine bell, blowing its whistle, or giving the plaintiff the slightest warning of its approach, though the said employees of the defendant in charge of and operating said engine and train well knew that the plaintiff was at work, as aforesaid, at said switch and that it was not to be expected that the said engine and cars would undertake to pass over said broken switch until plaintiff had notified them so to do, wilfully, negligently, carelessly and wrongfully ran the said yard engine upon and against the said plaintiff, who was working at said switch, and while the said plaintiff was exercising due, lawful and proper care, and thereby hurling the said plaintiff violently to and against the ground inflicted great injury upon him, wounding and hurting him in his back, side and body, so that the said plaintiff underwent and suffered much pain of mind and body, to wit, from thence hitherto, and was and is permanently injured in his back and side, to the plaintiff's damage in the sum of dollars; and therefore he sues.

1631 Swing, aerial, action

The owner of an amusement park who has an interest in the admission fees to the attractions is liable for an injury caused by his concessioner's failure to use reasonable care in the construction, management and operation of devices that are of a character to produce injury unless due care is observed in their operation.²⁴⁰

1632 Swing, aerial, Narr. (Va.)

For this, to wit, that heretofore, to wit, on the day of, 19.., at the time of the committing the grievances hereinafter complained of, the said defendants were engaged in conducting a large pleasure resort in the county of, Virginia, and in connection therewith operated numerous pleasure devices and machines, and amongst others a certain device and machine known as a spring swing; that said swing was composed of a center shaft to which were attached carriages or swings each carrying passengers; that at the foot of the shaft there were large exposed and uncovered cog wheels, and when the electric current was turned on, that being the motive power, by reason of the cog wheels, the carriages or swings would circle out from the center shaft until they reached a considerable height from the ground, and after swinging thus for a certain time the power would be cut off and the carriages or swings would gradually slow down and descend until they reached the starting point; that the machine was operated at night, as well as in the day time, and the light for it was furnished by small trolleys running on wires attached to the shaft; that if these trolleys slipped, the apparatus, the passengers, the large exposed cogs, and the operator would be left in darkness; that the device was patronized mainly by women and children and if the light trolleys slipped and it became dark the women and children would become terrified, scream and some attempt to jump out; that in such case, the operator would have to hurry to shut off the power and endeavor to get the trolleys in place, and to do this he would be compelled to get in near the shaft, lean forward over the large open and exposed cog wheels and, with a hook on the end of a stick, pull the trolleys in place, and during this time, he would have women and children swinging around him in carriages or in swings in considerable peril from their fright and excitement; that when the trolleys were new or in good condition, they acted fairly well; that said

²⁴⁰ Stickel v. Riverview Sharpshooters Park Co., 250 Ill. 452, 455 (1911).

plaintiff was employed by the said defendant to operate said machine or device, and when he was first employed employees were assigned to operate said machine, one sold tickets and kept the cash, one assisted passengers on and off and saw that the cars were not crowded, looked out to see that the children did not get near the machine and generally looked after the safety of passengers, one took up the tickets, and one operated the machine. But at the time of the injury of the plaintiff, he had been assigned alone to attend to all of the above duties, except for a lady who acted as cashier.

And thereupon it became necessary and was the duty of the said defendant to take reasonable and ordinary care so that the machinery and appliances were in a reasonably safe condition, and that the said trolleys should be kept in such condition that they would not frequently slip off and leave the said plaintiff and the passengers in darkness and danger, and to furnish said plaintiff a reasonably safe place in which to work; but the said plaintiff avers that the said defendant failed in its duty in that behalf, in this, to wit, that on the day of, 19.., between the hours of in thenoon the said plaintiff was operating said machine and device in a careful and prudent manner, but several times that night, the trolleys, which had become much worn, slipped and left the plaintiff and his passengers in darkness, and at about the time named, and while the passengers were swinging in the air, the said trolleys again slipped, and in the darkness, there were several cries from alarmed passengers, and one woman started to jump out of one of the carriages or swings, and the plaintiff shut off the power and hastened with his stick to pull the trolleys in place to get light, so as to quiet the passengers and bring them to the ground in safety. And the plaintiff avers that while he was leaning forward in the darkness one of his feet slipped and the other was thrown on and against the large open and exposed cogs, his foot was caught in them and a part ground nearly off, and as a consequence, the plaintiff suffered pain and was compelled to go to a hospital and remain for about; that his injuries necessitated the cutting off of his leg below the knee twice. And the plaintiff avers that he, several times, reported the condition of the trolleys to his employer, the said defendant, and requested that they be fixed and that he was promised that they would be fixed, but though there was ample time to have fixed them, they were not fixed up to the time of the injury to the plaintiff; by reason of which premises said plaintiff has been damaged dollars.

1633 Tracks in close proximity, Narr. (Ill.)

For that whereas, on, to wit,, 19.., the defendant was a corporation and was possessed of and operated

a line of railroad from the city of, in the county of, aforesaid, to and within the city of, in the county of, and state aforesaid with certain cars running thereon for the conveyance of goods and passengers for reward.

That, on, to wit, the date aforesaid, plaintiff became a passenger upon one of the cars of the defendant in the city of, aforesaid, to be conveyed to the city of, aforesaid, and had in his possession a ticket entitling him to a ride in defendant's said car from and within the city of, aforesaid, to and within the city of, aforesaid; that the defendant operated its cars upon a double track upon one of the public streets in the said city of, which tracks were placed so close together as to leave a space between the cars of defendant when passing upon said tracks of, to wit, one inch; all of which conditions were well known to the defendant and of which conditions the plaintiff was then and there without notice.

Plaintiff further avers that it then and there became and was the duty of the defendant to notify the plaintiff and the other passengers upon its said cars, of the close proximity of said cars, while said cars were passing upon said tracks, as aforesaid; but that the defendant carelessly and negligently failed and neglected to notify or warn him of the proximity of its said cars, while passing upon said tracks, as aforesaid, and plaintiff was without any notice or knowledge that defendant's said cars passed each other on said tracks in close proximity.

Plaintiff further avers that while he was riding upon said car as a passenger, aforesaid, and while seated at one of the windows in said car and while in the exercise of ordinary care for his own safety, another car of defendant passing upon said other track of defendant and within, to wit, inch.. of the body of the car upon which plaintiff was riding as aforesaid, caught and struck the left hand of the plaintiff, by means whereof the left hand and arm of plaintiff was thereby crushed, bruised, and injured and drawn to and between the defendant's said two cars; and plaintiff was thereby greatly and permanently injured as hereinafter alleged.

2. Plaintiff further avers that it also became and was the duty of the defendant to place bars or safeguards at the windows of said cars, so that passengers in said cars, while in the exercise of ordinary care for their own safety would not be injured by being struck by the defendant's car or cars passing the said adjoining tracks; but that the defendant carelessly and negligently failed to provide bars and guards at the windows of its said cars as aforesaid; and that, on, to wit, the date aforesaid, said plaintiff was seated at one of the windows in said car as a passenger as aforesaid, and while in the exercise

of ordinary care for his own safety, another car of defendant passing upon said adjoining track, by reason of the absence of bars or guards as aforesaid, upon the car upon which plaintiff was riding as aforesaid, then and there struck the left hand of the plaintiff, and he was thereby permanently injured as hereinafter alleged.

3. Plaintiff further avers that while he was a passenger upon defendant's said car as aforesaid, and while in the exercise of ordinary care for his own safety, and while seated at a window in defendant's said car, the defendant by its agents and servants so negligently and improperly operated said cars upon said double track aforesaid, that by and through the negligence and improper conduct of the defendant, by its said agents and servants in that behalf, a certain other car of defendant was then and there being propelled and driven upon the track adjoining the track upon which the car in which plaintiff was a passenger as aforesaid, was being driven; that said car on said adjoining track struck with great force and violence, and without any warning or notice to the plaintiff by the defendant or its agents or servants, the left hand of plaintiff, and his said hand was caught between the said two cars of defendant, and his said hand and arm was pulled and forced between said two cars, and he was thereby greatly and permanently injured.

And plaintiff avers that his health and nervous system were thereby shattered and impaired, and will continue to be so permanently; that on account of said injuries plaintiff became sick, sore, lame, disordered and injured, and will continue to be so permanently; that plaintiff has suffered great bodily pain and mental anguish and still is languishing and intensely suffering in body and mind, and in the future will continue to suffer bodily pain and mental anguish on account of said injuries; that plaintiff was by occupation a painter, paper-hanger, decorator and a contractor for painting, paper-hanging and decorating, and was capable of earning as such painter, paper-hanger, decorator and contractor for painting, paper-hanging and decorating, large sums of money, to wit, dollars, annually, and that by reason of said injuries he has been unable to work at his said occupation, and will be unable in the future on account of said injuries to work at his said occupation or any occupation and earn money; that he has paid out and become liable for large sums of money, to wit, dollars for physician's fees, surgeon's fees, medicine, care, nursing and attendance, in and about endeavoring to be healed and cured of his said injuries, and will be obliged in the future to pay out and become liable for large sums of money in endeavoring to be healed and cured of his said injuries, to the damage, etc.

1634 Train service incompetent, Narr. (Ill.)

For that whereas, on, to wit, the day of, 19..., the defendant was in possession and control of a certain railroad running and extending from to, in the state aforesaid, and was then and there engaged as a common carrier of passengers for hire between the points aforesaid; that on the day and date aforesaid, at the special instance and request of the defendant plaintiff became and was a passenger upon a certain passenger train of the defendant running from said to said, which train was under the control and management of the servants and agents of the defendant.

And the plaintiff avers that it then and there became and was the duty of the defendant to place its said passenger train under the control and management of careful and trustworthy agents and servants who would have a due regard for the safety of the passengers thereon and who would furnish such passengers with such trustworthy information as would enable them to alight from said train at the proper places and reach the passenger station of the defendant. Yet, the defendant, wholly regardless of its said duty in that behalf, placed said train in the charge and under the management and control of divers negligent and untrustworthy agents and servants, to wit, one certain conductor and one certain brakeman whose names are to the plaintiff unknown. And the plaintiff further avers that when said train was approaching the said station of the said servants of the defendant called the name of said station in the car in which plaintiff was riding to notify passengers that the said train was approaching the station of and as said train slowed up the plaintiff arose from his seat and went out upon the platform of the car in which plaintiff had been a passenger and finding the doors of the vestibule open inquired of the said conductor and brakeman the location of the passenger depot at which plaintiff was to alight from said train; that the said conductor and brakeman, well knowing that the said depot had not yet been reached by said train, wilfully, wantonly, negligently and falsely informed the plaintiff that the said depot was located at a point directly opposite where the train of the defendant then was and said to plaintiff "It is right over there;" that it was in the night time and so dark that plaintiff was unable to distinguish any object; that the said false information so given by said conductor and brakeman aforesaid induced the plaintiff to believe that the train on which he was riding had stopped at the defendant's passenger station and in consequence thereof the plaintiff, while in the exercise of due care for his own safety, attempted to alight from said train; but the plaintiff avers that the said

passenger station of the defendant was not at the place indicated by the said conductor and brakeman and the said train had not stopped as plaintiff had been so led to erroneously suppose, and in consequence whereof the plaintiff in attempting to alight from said train fell and was dragged and pulled under the defendant's said train and so mangled and bruised by the defendant's said cars as to make amputation of the plaintiff's arm necessary; by means whereof, the plaintiff became and was sick, sore and disabled and so continued for a long space of time, to wit, from thence hitherto; and suffered great pain; and was obliged to and did pay out and expend divers large sums of money in and about being treated and nursed during the time aforesaid; and was hindered and prevented from attending to his ordinary business or calling of a farmer in said county; wherefore, etc.

1635 Trestle accident, Narr. (Miss.)

Plaintiffs, and, are sisters of the whole blood, and are the only surviving heirs of, their mother and now deceased, the wife of, deceased.

On or about the day of, 19.., plaintiff's mother, a woman of about years of age, decrepit in body and weak and childish in mind, had started out to fish in one of the creeks or bayous, of, on or when, either going to or coming from said fishing expedition, the said started across one of defendant's trestles about miles and about of county, Mississippi, on defendant's line of track known as the division. This trestle is about feet long, and on either side is a deep and dangerous bayou. Plaintiffs' mother had walked a distance of about feet over said trestle on her way across the same when she was struck in the back by defendant company's bound passenger train that leaves about o'clock in thenoon every day, and was instantly killed.

Plaintiffs charge that the killing of their mother by defendant company's said train as above set forth was due to wilful misconduct of defendant's agents and servants in charge of said train or to such gross negligence and utter disregard for human life on the part of said train crew as to amount to wilfulness.

Plaintiffs aver that from the direction from which defendant's train was approaching said trestle, a person walking on said trestle could be seen without any effort on the part of one looking for a distance of at least mile., that defendant's train was running at the rate of or miles per hour, that it was a light train, equipped

with air-brakes and that it could be stopped at a short distance, and that although defendant's agents and servants saw the peril of this old woman in time to stop and avoid an injury, she having walked for a distance of feet over said trestle, for a greater part of the while in plain unobstructed view of the defendant's said agents and servants in charge of said train, who were looking, and that although said track was level and this accident could easily have been avoided by the least effort to stop the said train, said defendant company's agents and servants made no effort to stop said train before striking this old woman in the back, and that the only way she could have possibly avoided being struck by said train, would have been to have jumped into a ditch or boyou from the high trestle at the peril of her life. Wherefore, on account of the gross carelessness of defendant company's agents and servants, and their utter disregard of human life, as above set forth, plaintiffs have lost their mother and have been greatly injured by the loss of her services, and on account of the gross and wilful conduct of the defendant company's agents and servants in causing the death of their mother, bring this their suit in the sum of dollars and all costs.

1636 Unguarded machinery, action

It is the absolute duty of an employer, without notice of a factory inspector, to so locate, wherever possible, all machinery and appliances of the character mentioned in the Illinois statute, or to so properly enclose, fence or otherwise protect them, as not to endanger the safety of his employees.²⁴¹

1637 Unguarded machinery, declaration, sufficiency

A declaration which is based upon a violation of the statute requiring the proper location and protection of dangerous machinery is sufficient if it avers enough to show that the machinery in question was dangerous to employees and was not protected, although it fails to use the precise words of the statute.²⁴²

1638 Unguarded machinery, Narr. (Ill.)

For that whereas, the defendant, on, to wit, the day of, 19.., was the owner, user and operator of a certain factory, mill or workshop situated in the town of in said county and state of Illinois; that in said factory, mill

²⁴¹ Streeter v. Western Wheeled Scraper Co., 254 Ill. 244, 247 (1912); Sec. 1, Laws 1909, p. 202 (Hurd's Stat. 1911, p. 1128).

²⁴² Streeter v. Western Wheeled Scraper Co., 254 Ill. 248.

or workshop, on, to wit, the day aforesaid, the said defendant owned, used and operated certain power driven machinery, including saws, planers, jointers and other appliances for the purpose, among others, of manufacturing; and especially did said defendant use in its said factory, mill or workshop a certain jointer for the purpose of jointing, cutting and manufacturing plow beams and other materials.

And the plaintiff avers that thereupon it became and was the duty of the said defendant to use due and proper and ordinary care and caution to furnish the plaintiff with reasonably safe and suitable machinery with which to perform his work.

Yet, the defendant, not regarding its duty in that behalf, as aforesaid, on, to wit, the day aforesaid, negligently, wrongfully and carelessly failed and neglected to use due and proper care and caution to furnish the plaintiff with machinery with which he could with reasonable safety perform his duties in this, that the said defendant did negligently, wrongfully and carelessly furnish the plaintiff a machine, to wit, a certain jointer, which was not properly guarded by protective apparatus for the safety of the plaintiff for the carrying out of the terms of his employment, by reason of which said plaintiff was injured as hereinafter set forth.

2. And that it then and there also became and was the duty of the said defendant to use reasonable and ordinary care and caution to provide for the plaintiff a reasonably safe place in which to work and not to subject him to any extraordinary risk of hazard in the course of his duty and employment.

Yet, the defendant, not regarding its duty in that behalf, on, to wit, the day aforesaid, did not use reasonable and proper care and caution to provide for the plaintiff a reasonably safe place in which to discharge his duties and work, and wholly failed so to do and, on the contrary, did wrongfully and negligently subject the plaintiff to extraordinary risks and hazards in the course of his duty and employment, in this, to wit, that the said defendant on the day aforesaid caused, suffered and permitted two certain power driven machines, to wit, a jointer and a band saw to be and remain in such close proximity that the operatives of said machines could not operate and work upon said machines with reasonable safety to one another; that the last aforesaid two machines were so placed and arranged that the plaintiff could not, while performing his duties, work with reasonable safety to himself.

And the plaintiff avers that the said defendant by the exercise of reasonable care and caution might have known and did know of the aforesaid unsafe condition with reference to the location and proximity of said machine and that by failing to have the said machines separated to a reasonably safe distance from one another it carelessly and negligently subjected the plaintiff to extraordinary risks and hazards in his said

employment, of which facts and conditions the plaintiff did not have knowledge or equal means of knowledge as the defendant, and by means whereof plaintiff was injured as hereinafter set forth.

3. And it was then and there also the duty of the said defendant to warn inexperienced employees and to point out and explain to such inexperienced employees the dangers of such employment in said factory; that at the time and place aforesaid the defendant wrongfully and negligently neglected its duty in that behalf, and then and there provided for the use of its employees a certain power driven piece of machinery, known as a jointer, used for planing and jointing of wood, and the defendant then and there negligently and wrongfully suffered and permitted certain knives, gears, cogs, pulleys, belts and shafting, with which said jointer was operated, to be and remain unenclosed and unfenced and otherwise unprotected, so that persons and employees engaged in the work of operating said jointer were in great danger of being injured thereby when said jointer was in operation; that, while said jointer was in operation, the knives thereof revolved at a great and dangerous rate of speed, to wit, thousand times per minute.

And the plaintiff avers that the said jointer, knives, cogs, pulleys, belting and shafting were not reasonably safe to be used in said factory unenclosed, unfenced and unprotected, as aforesaid; all of which was then and there well known to the defendant, or by the exercise of ordinary care ought to have been known to the defendant, and all of which was unknown to the plaintiff, and the plaintiff did not have equal means of knowledge of such conditions as the defendant.

And the plaintiff avers that, at the time and place aforesaid, he was an inexperienced worker and did not know of the dangers and hazards incident to the operation of said jointer, concerning which inexperience on the part of the plaintiff, the defendant well knew or by the exercise of ordinary care or caution ought to have known; in consequence of which said plaintiff was injured as hereinafter set forth.

4. And the plaintiff avers that it was also the statutory duty of the said defendant, on the day aforesaid, to so locate said jointer, belting and shafting, wherever possible, as not to be dangerous to employees of the said defendant, or that the same should be properly enclosed, fenced or otherwise protected; but the said defendant, not regarding its statutory duty in that behalf, on the day aforesaid, wrongfully and negligently maintained, used and operated in its said factory certain power driven machinery, including a certain jointer, with certain belting and shafting, wherewith the same was operated, which said power driven machinery, including said

jointer, belting and shafting was dangerous to employees and was not properly enclosed, fenced or otherwise protected; that, on the day aforesaid, it was possible and practical for the defendant to operate its said factory with its said power-driven machinery, including said jointer, belting and shafting, properly enclosed, fenced and otherwise protected, so that the same would not be dangerous to employees, and that it was possible and practical to so locate the said power driven machinery, including said jointer, belting and shafting, so that the same would not be dangerous to employees; that, on the day aforesaid, the said defendant then and there wrongfully and negligently suffered and permitted the aforesaid jointer, belting and shafting, wherewith the same was operated to be and remain unenclosed, unfenced and unprotected and dangerous to employees, contrary to the form of the statute in such case made and provided, so that persons and employees engaged in and around the said jointer were in great danger of becoming injured thereby when said jointer was in operation; that when said jointer was in operation the knives, which formed a part of said jointer, were unenclosed, unfenced and otherwise unprotected, and were not reasonably safe to be used in said factory; and that, on the day aforesaid, it was possible and practical to enclose, fence and protect the said knives in said jointer so that the same would be reasonably safe to be used in said factory by employees of the said defendant; all of which was then and there unknown to the plaintiff and was then and there well known to the defendant, or by the exercise of ordinary care and caution ought to have been known by the said defendant.

And the plaintiff avers that, at the time and place aforesaid, he was a laborer or helper in the employ of the said defendant in its said factory, and was then and there engaged in assisting the operator of said jointer in said factory in the planing and jointing of certain plow beams and, while said plaintiff was engaged in said employment, and while in the exercise of due care and caution for his own safety, the plaintiff's hand then and there unnecessarily and unavoidably became caught and thrown into and against the knives and other parts of the said jointer, by reason of the said jointer and the knives thereof being unenclosed, unfenced, unguarded and otherwise unprotected, and by reason whereof the plaintiff's hand was cut, bruised and lacerated and certain of the plaintiff's fingers, to wit, fingers, were cut off and then and there and thereby he became and was and is permanently disabled, to the damage, etc.

(Michigan)

For that whereas, heretofore, on, to wit,, and for a long time prior thereto, said defendant owned, controlled and operated a certain factory situate in the city of

..... in said county and state, for the manufacture of forest products, in which intestate then was employed as a laborer in the story thereof.

That in the upper part of said story and about eleven feet from the floor thereof, there was located an iron shaft about feet in length attached to a frame hanger, said shaft being parallel with and about inches above the lower timber of said hanger, its ends attached to the sides of the uprights thereof, and at and near the left of the center of said shaft, and inside said uprights, there was located a pulley, around which passed a leather belt about inches in width connected with and operating an elevator employed to convey products from said story to one above, and on the left end of said shaft and inside said uprights, and about inches from said pulley, there was located an iron collar about inches in diameter, surrounding said shaft and attached thereto by a set screw, the end of which protruded about one inch from the surface of said collar.

That in the ordinary operation of said factory said shaft revolved about one hundred times a minute and said products at times would clog and stop said elevator and the continued revolutions of said shaft would force such belt of said pulley onto said shaft at the left; that no proper shifter or other mechanical contrivance for the purpose of throwing such belt on said pulley, and no proper safeguard was then provided for such belting, and although possible, no loose pulley was employed on said shaft to receive such belt when so forced off, and no guard was employed about said set screw.

That whenever such belt was so forced off it was impossible to replace it unless the machinery of said factory was in motion and the only method provided for so replacing it was for one of said laborers to place a ladder against such lower timber of said shaft, ascend such ladder, and with said machinery so in motion, force said belt on such pulley with his right hand; that such act required severe physical exertion and in order to counterbalance the force used and hold such ladder in place it was necessary for such laborer to insert his left hand between said shaft and lower timber near said collar and set screw, and grasp such timber firmly and securely therewith; that while so employed the attention of said laborer was engrossed with maintaining his position on such ladder and the work of his right hand and said collar and set screw were not within his observation, and the revolution of said shaft, the accumulation of dirt, oil and grease on said collar, and the duskiess of the upper part of said story, obscured the presence of said set screw, thus exposing such laborer to the liability of injury by having his clothing caught and he be involved in such shaft.

That the tendency of said belt to be so forced from said

pulley, the method so provided for replacing it, and the presence of said set screw, were then unknown to the factory inspector having jurisdiction under an Act No. 113 of the acts of this state for the year 1901, as amended, and his several assistants and deputies, and their attention had not theretofore been directed thereto, in consequence of which no such inspector before then was called upon under said Act to exercise, or did exercise any discretion as to the employment of a proper shifter or other mechanical contrivance for the purpose of throwing such belt on such pulley, or of determining the necessity of guarding such set screw, as otherwise might have been so exercised and determined, and the existence of said set screw was then unknown to plaintiff.

That prior to said day of, such inspector, under authority contained in said Act, ordered defendant to cover and properly guard all set screws in said factory, without distinguishing such set screw from others employed therein.

That, on, to wit, said day of,, said elevator becoming so clogged and said belt being so forced off said pulley, intestate, under the terms of his employment was required to replace, and then did attempt to replace said belt in the method above provided hereinbefore alleged.

Plaintiff avers that it then and there became and was the duty of defendant to have covered and guarded said set screw so that the clothing of intestate coming in contact with such shaft and collar would not be caught by said set screw and he be involved in said moving shaft; but that defendant then and there carelessly, negligently and wrongfully omitted its duty in that behalf, in that it then and there carelessly, negligently and wrongfully failed to cover and guard such set screw.

Plaintiff further alleges that defendant having theretofore been ordered by such inspector, under authority contained in said Act No. 113 of the acts of this state for the year 1901 as amended, to cover and properly guard all set screws in said factory, it then and there became and was the duty of defendant under such Act to have covered and guarded said set screw so that the clothing of intestate coming in contact with such shaft and collar would not be caught by said set screw and he be involved in such moving shaft; but that defendant knowingly and wrongfully omitted its duty in that behalf, in that it then and there knowingly and wrongfully failed to cover and guard such set screw, after being so ordered by such inspector.

Plaintiff further alleges that having so omitted and failed to cover and guard such set screw it then and there became and was the duty of defendant to inform and warn intestate of the existence and presence thereof so that he might avoid liability of injury through having his clothing caught thereby and he be involved in such moving shaft when so replacing

said belt; but that defendant then and there carelessly, negligently and wrongfully omitted its duty in that behalf, in that it then and there carelessly, negligently and wrongfully failed to inform or warn intestate of the existence or presence of said set screw.

Plaintiff further alleges that under the provisions of section 8 of said Act No. 113 of the laws of this state for the year 1901, as amended, it then and there became and was the duty of defendant to have provided the said belting with a proper safeguard and said shaft with a loose pulley to receive such belt when so forced off; but that defendant then and there knowingly and wrongfully omitted its duty in that behalf in that it knowingly and wrongfully failed to provide such belting with any safeguard and such shaft with a loose pulley to receive said belt when so forced off.

Plaintiff further alleges that defendant having knowledge of the location of said shaft and of said hanger, pulley, belt collar and set screw, and of the tendency of said products so to clog said elevator, and of such revolutions of said shaft so to force said belt off said pulley onto such shaft, and that no such proper safeguard for such belting and no such proper shifter or other mechanical contrivance was so provided, and that no loose pulley was so employed, and of the impossibility of replacing such belt except with said machinery in motion, and of the method then provided for so replacing it, and that the attention of such laborer so employed was so engrossed, and of said collar and set screw not then being covered or within the observation of such laborer, and of such accumulation of dirt, oil and grease, and such darkness, all tending so to obscure the presence of such set screw and of the exposed situation of the laborer so employed in replacing said belt, and of his liability to injury when so doing, and having or being charged with knowledge of the provisions of said section 8 of Act 113 of the Public acts of this state for the year 1901, and of the duty of the said factory inspector, his several assistants and deputies, therein referred to, to exercise their discretion as to whether such proper shifter or other mechanical contrivance for the purpose of throwing such belt on said pulley, should be furnished or supplied, and of determining the necessity of properly guarding such set screw, and of the fact that no such inspector, assistant or deputy theretofore had been so advised or informed, it then and there became and was the duty of defendant in the premises to have so advised and informed such inspector, assistant or deputy, so that he, the said inspector, assistant or deputy, might exercise his discretion as to the use of such shifter or other mechanical contrivance and determine the necessity of properly guarding said set screw.

Plaintiff avers that defendant then and there knowingly and wrongfully omitted its duty in that behalf, in that it knowingly

and wrongfully failed to advise and inform such inspector, assistant or deputy in the premises, in consequence of which no such inspector, assistant or deputy theretofore exercised any discretion in requiring defendant to furnish or supply, or cause to be furnished or supplied, any proper shifter or other mechanical contrivance for the purpose of throwing such belt onto said pulley, or of determining the necessity of properly guarding such set screw, other than in the general direction given as aforesaid, and having so knowingly and wrongfully failed to advise and inform such inspector, assistant or deputy then and there carelessly and negligently failed to furnish and supply such proper shifter or other mechanical contrivance and then and there carelessly and negligently failed to guard such set screw; in consequence whereof, as intestate was so replacing such belt on such pulley, in the method so provided and in the exercise of due care on his part, the clothing of his left arm was caught in said set screw and he was suddenly drawn over the top of said moving shaft and the bones of his said left arm were crushed and broken about three inches above the elbow, and the flesh and muscles of the said arm were stripped from the bones thereof and such lower part of said arm was completely pulled and severed therefrom, and the muscles and nerves of his shoulders strained and impaired and the flesh of his face and nose was cut and his head and the internal organs thereof injured, impaired, lacerated and torn; that in consequence of the serious injury so inflicted upon his left arm it became necessary to amputate and cut off a portion of it about four inches above the elbow, and his said arm and shoulders and the muscles and nerves thereof were crippled and maimed and he became and was permanently injured.

That at the time of such injuries intestate was of the age of years and was strong and able-bodied, and afflicted with no disease other than a suppurative inflammation of the middle right ear, and was capable of earning, and was earning the prevailing wages of a common laborer; and in consequence of such injuries and of the injuries so sustained by him in his said shoulders, and the loss of his said arm, he thereupon became lame and the flesh of his face and nose became sore and disfigured, and the muscles and nerves of his shoulders became powerless to perform their usual functions, and his head and such ear were seriously injured and ruptured, and the said inflammation was aggravated and extended, and he became, continued and remained permanently injured in his left arm and shoulders and sick and sore, and the disease of said ear continued and was aggravated and extended, and he so continued for a long period of time, to wit, from thence hitherto, wholly unable to earn such prevailing wages, or to perform or to attend to, care for or manage his affairs or business, and his nervous system became weakened

and incapable of resisting disease, and thereafter and, on, to wit, day of,, he died from the effects of such injuries and disease.

That by reason of such injuries and the aggravation of said disease intestate was compelled to lay out and expend, and did lay out and expend, large sums of money for medical and surgical aid, medicine, care and nursing, and suffered great bodily pain; that said condition was caused wholly from said injuries and the results thereof; and that in consequence thereof and of his final sickness, burial and death so resulting from such injuries, his estate was put to large expense, to wit, the sum of dollars, and has lost the several sums which otherwise intestate would have earned had he lived until the termination of the expectancy of his life, to plaintiff's damage as such administratrix in, to wit, the sum of dollars.

That intestate left surviving him, his widow, and, his son, next of kin, and by reason of his death his said estate and plaintiff and said widow and son each has suffered pecuniary injury, and has been and is deprived of means of support and contribution theretofore made to them by intestate, and a right of action has survived and accrued to plaintiff as such administratrix, and she has suffered great damage in, to wit, the sum of dollars; and therefore she brings suit.

1639 Unseaworthy vessel, Narr. (Mich.)

For that whereas, heretofore, to wit, on the day of, 19.., the said defendant, the company, was a corporation, and had a place of business at street, in the city of, county and state aforesaid, and having its principal business office at in said city; that at the time aforesaid, and for a considerable time prior thereto, the said defendant used, handled and controlled, in its said business, the tug, and was at the time aforesaid, by its officers and agents, engaged in hauling ice from county, Michigan, to its said place of business at street,, county, Michigan, by means of said tug and certain ice barges hauled by said tug; that defendant was the master or captain of said tug and in charge of said work, defendant was the engineer of said tug, plaintiff was the fireman, and as such had principal charge of the duty of handling the tow line or ropes, and on the occasion aforesaid, the said crew was taking two empty barges from aforesaid, to aforesaid, with said tug, expecting to leave one of said barges at, and to bring back the other of said barges, with said tug to said place of business on street, with a load of ice. Said night was

a very dark night, and said crew left at P. M. of the, instead of P. M. as usual, and was due at about o'clock A. M. of the in the dark instead of daylight as usual.

And the plaintiff avers that being in control of said tug and barges and conducting said business, the said defendant, the company, owed the plaintiff, its fireman, the following duties:

1. To see that said tug and barges were seaworthy, properly manned with competent seamen, agents and officers, and equipped with all appliances necessary for its use and for the safety of the crew.

2. To employ and retain skillful and competent fellow-servants, and a sufficient number of them to enable plaintiff to do his part of said work with reasonable safety to himself.

3. To furnish reasonably safe appliances for the use of the said plaintiff and his co-servants in charge of said work, including proper lights and proper lighting material to enable the plaintiff to see the situation of said tug in case anything went wrong and he was obliged to work upon said deck in the darkness of the night, and proper instruments and instrumentalities to enable the master of the tug to locate the tug in case it became stranded in the mud or upon shoals or sandbars, or in any other way disabled from proceeding, such as a compass and other instrumentalities.

4. To supply said tug and barges with all the implements and instrumentalities necessary for said trip in view of the time and circumstances under which said trip was to be made, namely, with all appliances necessary for the making of said trip and the safety of the crew.

5. And it was the duty of the remainder of the defendants to exercise ordinary care, skill and diligence, in operating said tug and doing said work in such a manner as not to imperil the safety of the plaintiff.

Yet, the said defendant, the company, did not regard said duties, or any or either of them, but wholly disregarded each and every of the same, and carelessly and negligently failed to furnish a safe and suitable tow line with which to haul and draw said ice barges and furnished an unsuitable and dangerous line for that purpose, and a line containing kinks, loops and turns whenever the same was slackened or not stretched out or not pulling the barges; and carelessly and negligently failed to see that said tug and barges were seaworthy, properly manned with competent seamen, agents and officers, and equipped with all appliances necessary for their proper use and for the safety of the crew and the plaintiff.

And carelessly and negligently failed to employ and retain skillful and competent master and fellow-servants and a suffi-

cient number of them to enable plaintiff to do his part of said work with reasonable safety to himself.

And carelessly and negligently failed to furnish reasonably safe appliances for the use of plaintiff and his co-servants in charge of said work; and carelessly and negligently failed to supply said tug and said barges with proper lights and proper lighting material to light the deck of said tug when anything went wrong in the darkness, and plaintiff was obliged to work upon said deck in such darkness; and carelessly and negligently failed to provide proper implements and instrumentalities to enable the master of said tug to locate the same when it became stranded in mud banks or upon shoals or sandbars, or in any other manner disabled from proceeding, such as a compass.

And carelessly and negligently failed to supply said tug and barges and the persons in charge of the same with such implements and instrumentalities as were necessary for said trip in view of the time and circumstances under which said trip was to be made, namely, failed to provide such appliances that were necessary for the making of said trip and the safety of said crew; and carelessly and negligently retained and employed said captain and engineer who negligently left their post of duty in the darkness of the night when they knew said tug was in trouble and stranded and matters were going wrong; and carelessly and negligently retained said and, men whom it knew were wholly incompetent to discharge the duties devolving upon them.

And the remainder of the said defendants carelessly and negligently failed to use ordinary care, diligence and skill in operating said tug and doing said work, and did said work so unskillfully and negligently that plaintiff's life and limb were imperiled thereby.

And the plaintiff avers that he had been directed by his superiors, both the said captain and engineer, whose orders it was his duty to obey and heed, to assist the said in handling the lines and ropes whenever it should be necessary; and plaintiff avers that it is the duty of the fireman, assistant fireman, and any tug man having any duty to perform in connection with the ropes or lines, if they see any line slipping to proceed at once to securely fasten the same to prevent its slipping, which duty he is taught and the discharge of which is insisted upon from the time he first enters upon his work.

And the plaintiff further avers that before said tug arrived at, it became stuck in the mud-bank, that while said tug was so situated in said mud-bank, after having fixed his fires by direction of the engineer, he stepped upon the deck of said tug and was on the rear of the same, when he saw the line slipping away from said, and at once, in discharge of his duty as it had been taught him for

more than a score of years, he went to the assistance of said and attempted to secure said line or rope; that at said time, by direction of said captain, one of said barges was placed in front of said tug and one behind, and it was the one that was behind whose line was slipping and which line plaintiff was trying to secure.

And the plaintiff avers that at the time he went to the assistance of said he had no knowledge that either the engineer or master of said tug had left his post of duty, and plaintiff in the darkness of the night, was upon the deck of said tug and attempting to assist said to secure said line, which held said rear ice barge, and which barge was being pushed away from said tug by the force of the waves made by the current of the wheel forming part of said tug, and the plaintiff in the darkness aforesaid, for want of suitable lights to light said dark, and want of a proper tow line to hold said barge, was caught in the kinks and loops of said rope and pulled twice around the post in the rear of the cabin of said tug by said rope, and had his left leg crushed and mangled to such an extent that it became necessary to amputate the same between the hip and knee, nearer the hip than knee.

And the plaintiff avers that said injury could not have taken place had said and remained at their post and had said been competent to properly fasten said rope or line; neither could it have happened, had said tug been supplied with proper implements and instrumentalities, including proper tow lines and lights. And the plaintiff avers that he was ignorant of the incompetency and carelessness of the said assistant fireman, and the carelessness and incompetency of the said master and engineer, and the said defendant the company as chargeable with notice thereof.

And the plaintiff avers that by reason of the premises and by reason of being pulled about said post, while held by said dangerous tow line, he became sick, sore, lame and disordered for life; that he has permanently lost his said leg and has suffered indescribable pain and distress, and will have to go through life on one limb; that he was at the time years of age and had followed firing on tugs twenty odd years, and has no trade he can follow in his present condition; that he has lost his time from thence hitherto, and been put to great expense in trying to be cured of his injuries; that on account of his expenses, and loss of earnings, present, past and future, and on account of the permanent loss of said limb, and the misery and suffering he has endured he claims damages at the hands of the said defendants in the sum of fifteen thousand dollars.

2. And for that whereas, on the day and date aforesaid, and under the circumstances aforesaid, and while in the employ

of the said defendant, the company as aforesaid, the plaintiff was injured under the circumstances more fully set forth in count one of this declaration, which said count one is hereby incorporated into count two so far as the same describes the circumstances surrounding the plaintiff's injury and the causes leading up to the injury and from which said injury resulted. And plaintiff hereby requests permission to incorporate said allegations in said count one into this count; and further avers that he was injured while in the employ of the defendant, the company, on the day of, 19.., in or, near, county, Michigan, while under the directions and orders of, who was master of the tug; that without fault or negligence on his part, and wholly by reason of the negligence and default of the said defendant, the company, who owned and operated said tug, and the master thereof, plaintiff sustained injuries resulting in the loss of his left leg, which said injuries he received in the performance of his duty.

And the plaintiff avers that by reason of the premises and by reason of the fact that said tug was to make a trip from to in the darkness of the night, and by reason of the fact that said tug might become stranded in the darkness, it became and was the duty of the said defendants to provide said tug with means of cure and with such articles and things as would enable plaintiff and his associates to provide temporary means of relief in case of injury or misfortune, to wit, to provide said tug with such means and instrumentalities and medicines and other things as would enable plaintiff and his associates to provide temporary relief.

And the plaintiff avers that being ill and injured as aforesaid, while in the performance of his duty, it was incumbent upon the defendant, the company, and the defendant,, master of said tug, to furnish means of cure, and to use all reasonable exertions for that purpose. It became their duty to provide medicine and medical treatment, and to see to it that he was properly lodged, properly nursed, and properly provided with food; and this obligation was incumbent upon them so long as the same was necessary to effect a cure; and if such medical and surgical treatment as his condition required could not be given on board the tug, the same being only a short distance from port where such treatment could be given, it became and was the duty of the said defendants to at once put him to port.

Yet, the said defendants, the company, and, wholly failed to discharge each and every of the said duties; and he avers that being mangled as aforesaid, he requested and implored to be immediately put to shore and be provided with a physician to attend him, which said proper and reasonable request was declined, neglected and

refused, and plaintiff was detained on said tug for a period of five hours within a few miles from the city of and a couple of hours' ride from the city of, without any nursing, care or aid whatever, during all of which time he suffered great, excruciating and untellable pain and distress, and suffered severely from loss of blood; and during all of which time he was provided with no temporary relief, care, treatment or nursing whatever, and instead of abandoning said ice barges and taking plaintiff to shore where he could obtain relief, he was cruelly detained upon said tug until the ice barges had been securely placed at the dock at to be loaded with ice, after which time said captain and engineer attempted to bring plaintiff to to be delivered at the over the railway branch of the without calling a physician to attend him.

And the plaintiff avers that by reason of said cruelty and neglect after the receipt of said injuries, and on account of the want of proper means and safeguards to provide temporary means in case of injury, he sustained and suffered many hours of pain and distress which would have been wholly unnecessary had said safeguards been provided, and had he not been neglected after said injury was received, and had his needs not been postponed and neglected until the ice barges were placed at the dock at, on account of which unnecessary suffering and cruel neglect plaintiff claims damages from the said master of said tug, and the company, in addition to the damages claimed in the first count of this declaration in the sum of dollars. And the plaintiff avers that he would have been brought to, in his suffering condition, and his injuries would probably have proven fatal, except for the conductor in charge of the car, who caused him to be taken from said car and placed in the care of a physician when it arrived at the city of

And the plaintiff avers that by reason of the premises he claims damages in the amount aforesaid, and therefore brings suit, etc.

1640 Wrongful death, action, nature

A right to maintain an action against a party who causes the death of another by wrongful act, neglect or default, is statutory, for, at common law, no such action was maintainable.²⁴³ In Illinois, an action for death resulting from a wrongful act is maintainable if the wrongful act was committed or omitted in the state, although the death followed in another

²⁴³ *Crane v. Chicago & Western Indiana R. Co.*, 233 Ill. 259, 262 (1908).

state, because the wrongful act, and not the death constitutes the cause of action.²⁴⁴

1641 Wrongful death, action, distinctions

In Michigan, in case injuries result in death, the personal representative has a single remedy, depending upon the death's proximity to the injury. If the death is instantaneous, the action must be brought under the Death act for the benefit of the next of kin, and recovery can only be had for the pecuniary loss. If the death is not instantaneous, the action must be based upon the Survival act, brought for the same persons, and recovery may be had for the full measure of damages. In either case, however, it is permissible to join counts under both acts.²⁴⁵ So, in Illinois, a clear distinction has been established between a cause of action existing under the Death statute and an action maintainable under the Survival statute. This distinction is that the first act gives a new right of action to the administrator, which at common law, terminated at death, while the second act merely continues an existing action or right of action which would have abated but for such statute.²⁴⁶ A further distinction is that the damages under the Death act are exclusively the property of the next of kin, the personal representative acting solely as trustee for them in their recovery, whereas the damages recoverable under the Survival act belong to the estate.²⁴⁷ An action for personal injuries on behalf of the widow and next of kin is maintainable against a wrongdoer or his personal representatives under the Survival act of Illinois, whether the person injured or the wrongdoer, or both die before judgment, the only cause of action surviving being that in favor of the widow and next of kin.²⁴⁸

1642 Wrongful death, notice

No notice to a municipality is necessary to the institution of an action for wrongful death, as such an action is not for personal injuries within the meaning of the statute which requires

²⁴⁴ Crane v. Chicago & Western Indiana R. Co., *supra*.

²⁴⁵ Dolson v. Lake Shore & Michigan Southern Ry. Co., 128 Mich. 444, 454 (1901).

²⁴⁶ Chicago & Eastern Illinois R. Co. v. O'Connor, 119 Ill. 586, 594 (1887); Holton v. Daly, 106 Ill. 131, 140 (1882).

²⁴⁷ Holton v. Daly, 106 Ill. 137; Chicago, Peoria & St. Louis R. Co. v. Woolridge, 174 Ill. 330, 334 (1898).

²⁴⁸ Devine v. Healy, 241 Ill. 34 (1909).

notice of personal injuries to be given to a municipality as a condition precedent to the bringing of an action against it.²⁴⁹

BILL OF PARTICULARS

1643 Motion (Ill.)

²⁵⁰ Now comes the defendant, by, his attorney, and moves the court for a rule on the plaintiff to file a bill of particulars as to the directions in which said plaintiff and said car were respectively going on the occasion in question. Without the information above prayed for it will be unsafe for the defendant to proceed to the trial of said cause.

1644 Bill of particulars (Md.)

This action is brought under the provisions of article 67, Code of the Public General laws, sections 1, 2, 3 and 4, and all additions and amendments thereto for the benefit of, the father of, who was killed while a passenger on the car of the defendant company, on, 19.., at or near station, in the state of Maryland, by reason of said car colliding with another car of the said defendant, through the negligence, want of care and default of the defendant, its officers, servants and agents in the premises, and without the negligence or want of care on the part of directly thereto contributing.

The said deceased was a vigorous, active young man, under the age of years, in sound bodily health, following the wholesale and retail business in, for and on account of the equitable plaintiff from which he derived a large revenue, and from which the equitable plaintiff, his wife, and family received maintenance and support; that the death of was directly caused by the negligence, default and want of care of the defendant, its officers, servants and agents in the premises, and without the negligence or want of care upon the part of the deceased directly thereto contributing.

DEMURRER

1645 Form (Va.)

Now comes the defendant by its attorneys and demurs to the plaintiff's said declaration, because the same is insufficient in law, and for ground of demurrer says:

1. That the said declaration does not state with sufficient particularity and clearness the acts of negligence on the part

²⁴⁹ Prouty v. Chicago, 250 Ill. 222, 226, 230 (1911); Laws 1853, p. 97; Sec. 2, Cities and Villages act (Hurd's Stat., 1909, c. 70).

²⁵⁰ Precede this by plea of general issue.

of the defendant company to enable it to understand the nature of the charge it is called upon to answer.

2. That the declaration does not state sufficient facts to enable the court to say upon demurrer whether if the facts stated are proved the plaintiff is entitled to recover in this action.

3. That the declaration contains only a statement in general terms of the cause of action, and general averments of negligence on the part of the defendant which are not sufficient.

4. (State any other ground that might be applicable)

And the said defendant prays judgment upon its said demurrer.

SPECIAL DEFENSES, PLEAS, ETC.

ASSUMED RISK

1646 Origin of doctrine

The doctrine of assumed risk was first declared in this country in 1842, and is predicated upon the contractual relation of master and servant and not upon the maxim *Volenti non fit injuria*. (He who consents cannot in law receive an injury) ²⁵¹ Therefore this defense cannot be urged where the relation of master and servant is forbidden by law.²⁵²

1647 Doctrine of assumed risk

An employee assumes all of the usual known dangers incident to the employment, and takes upon himself the hazard of the use of defective tools and machinery, which, after his employment, he knows to be defective, or might have known, had he exercised due care, but voluntarily continues in the employment without objection, and the danger is such that a person of ordinary intelligence would know what would naturally follow from the defect,²⁵³ unless the continuance in the work is under a promise to repair at a fixed time or within a reasonable time if no definite time is fixed, and the defect is not such as to so endanger the person of the employee that a prudent man would not continue to work under the same circumstances.²⁵⁴

²⁵¹ Streeter v. Western Wheeled Scraper Co., 254 Ill. 254, 255; Dalm v. Bryant Paper Co., 157 Mich. 550, 554 (1909); O'Rourke v. Sproul, 241 Ill. 576, 580 (1909); Shoninger Co. v. Mann, 219 Ill. 246; Mueller v. Phelps, 252 Ill. 630, 634 (1912).

²⁵² Dalm v. Bryant Paper Co., *supra*.

²⁵³ Illinois Central R. Co. v. Fitzpatrick, 227 Ill. 478, 483 (1907);

Montgomery Coal Co. v. Barringer, 218 Ill. 327, 331 (1905); Schillinger Bros. Co. v. Smith, 225 Ill. 74, 77 (1907); Gunning System v. Lapointe, 212 Ill. 274, 279 (1904); Elgin, Joliet & Eastern Ry. Co. v. Myers, 226 Ill. 358, 364, 366 (1907).

²⁵⁴ Gunning System v. Lapointe, *supra*; Morden Frog & Crossing Works v. Fries, 228 Ill. 246, 250 (1907).

1648 Scope of doctrine, law and fact

The foregoing rule applies to dangers which are in contemplation at the time of the hiring and to those which arise and become known to the employee during service,²⁵⁵ and which are obvious and apparent,²⁵⁶ or which are so obvious that knowledge of their existence can be fairly presumed. The presumption of knowledge does not extend to dangers which are not obvious, which arise solely out of extraordinary or exceptional circumstances,²⁵⁷ and with which the employee is suddenly confronted. In such case, it ordinarily rests with the jury to say whether the employee acted with sufficient promptness and with such care for his personal safety in extricating himself as a reasonable man should have acted under similar circumstances.²⁵⁸ An employee assumes a risk where the particular defects in the appliances or the conditions connected with the particular services in which he is engaged are equally known to him and the employer, and he continues in the service without complaint and without any promise from the employer to remedy such defects.²⁵⁹

1649 Presumptions

The employee has a right to presume that his employer will exercise care and prudence to prevent the exposure of his employees to unreasonable risks or dangers.²⁶⁰ So, the employer has a right to assume that an employee of mature years is possessed of ordinary mental faculties, of the usual powers of observation, and of such knowledge as is acquired by common experience.²⁶¹

1650 Promise to repair, law and fact

Upon a promise to repair, the employee is relieved from the assumption of risk of the employment for such a time as is reasonably necessary to enable the employer to remedy the danger, unless it is so obvious and imminent that no man of ordinary

²⁵⁵ *Ross v. Chicago, Rock Island & Pacific Ry. Co.*, 243 Ill. 440, 444 (1910).

²⁵⁶ *Postal Telegraph-Cable Co. v. Likes*, 225 Ill. 249, 261 (1907).

²⁵⁷ *McCulloch v. Illinois Steel Co.*, 243 Ill. 464, 469 (1910); *Hansell-Elcock Foundry Co. v. Clark*, 214 Ill. 399, 406, 410 (1905).

²⁵⁸ *Asmossen v. Swift & Co.*, 243 Ill. 93, 97 (1909).

²⁵⁹ *Jenco v. Illinois Steel Co.*, 233 Ill. 301, 306 (1908).

²⁶⁰ *McCulloch v. Illinois Steel Co.*, 243 Ill. 464, 469 (1910); *Superior Coal & Mining Co. v. Kaiser*, 229 Ill. 29, 33 (1907).

²⁶¹ *Illinois Central R. Co. v. Swift*, 213 Ill. 307, 315 (1904).

prudence would engage in the work, or unless the defects in tools or appliances are of a construction with which the servant is as familiar as the employer;²⁶² and whether the danger is of such character and whether the employee continued longer than was reasonably necessary to enable the conditions to be remedied are questions of fact.²⁶³ An employee's complaint of a defect and notice to the employer must be on account of an apprehension of danger to the employee giving the notice or making the complaint, and he must have an intention to quit work unless the defect is remedied; but it is not necessary that he should, in terms, declare such an intention.²⁶⁴

1651 Unknown risks

An employee does not assume risks which are unknown to him and are known to the employer, and which could not have been known to the employee by the exercise of reasonable care, and which could have been avoided by the employer by exercising reasonable care on his part;²⁶⁵ nor does he assume unusual dangers which are naturally incident to the employment but of which the employee is not cognizant;²⁶⁶ nor dangers which are not ordinarily incident to the service.²⁶⁷

1652 Obeying command

Nor does an employee assume a risk when he is directed to encounter a danger by the order of the employer or of men who stand in that relation, and he obeys, unless the danger is so great that an ordinarily prudent person would not have encountered it.²⁶⁸ So, an employee may recover for an injury which results from the carrying out of a specific direction given by a superior to do a work in a dangerous manner, unless the danger is so imminent that a reasonably prudent man would

²⁶² *Scott v. Parlin & Orendorff Co.*, 245 Ill. 460, 469 (1910); *Cromer v. Borders Coal Co.*, 246 Ill. 451, 456 (1910).

²⁶³ *Scott v. Parlin & Orendorff Co.*, 245 Ill. 469.

²⁶⁴ *Morden Frog & Crossing Works v. Fries*, 228 Ill. 251.

²⁶⁵ *Kenny v. Marquette Cement Co.*, 243 Ill. 396, 402 (1910).

²⁶⁶ *Henrietta Coal Co. v. Campbell*, 211 Ill. 216, 226 (1904).

²⁶⁷ *Mobile & Ohio R. Co. v. Val-
lowe*, 214 Ill. 124, 129 (1905); *John-*

son v. Desmond Chemical Co., 152 Mich. 84, 89 (1908).

²⁶⁸ *Elgin, Joliet & Eastern Ry. Co. v. Myers*, 226 Ill. 358, 364, 366 (1907); *Springfield Boiler & Mfg. Co. v. Parks*, 222 Ill. 355, 359 (1906); *Henrietta Coal Co. v. Campbell*, 211 Ill. 216, 226 (1904); *Kennedy v. Swift & Co.*, 234 Ill. 606, 609 (1908); *Cheneweth v. Burr*, 242 Ill. 312, 318 (1909); *Wells & French Co. v. Kapaczynski*, 218 Ill. 149, 152 (1905).

not incur it; but an employee cannot recover where he is given a general order to perform a task and he is to use his own discretion as to the manner in which the work shall be done, and where there exists a safe and a dangerous way which are equally open to him and he selects the unsafe method through heedlessness, or because it involves less exertion on his part.²⁶⁹

1653 Dangerous place

Employees whose duty is to make dangerous places safe assume the additional hazard of their employment.²⁷⁰

1654 Ordinary tools

An employee assumes a risk for an injury, even under a promise to repair, from an instrument which is simple in character and which requires no special skill or experience to enable him, at a glance, to comprehend the possible dangers, if any, that might result from its use.²⁷¹

1655 Personal and statutory duties

Ordinarily, the neglect of an employer to perform his personal duties is not a peril that an employee assumes;²⁷² but he does assume the risk if he continues in the service without complaint or excuse and with knowledge, or with the means of knowledge, of the particular neglect and the consequent danger.²⁷³ An employee does not assume a risk which arises from the employer's negligent performance of a statutory duty imposed upon him for the protection of his employees.²⁷⁴ Thus the defense of assumed risk is inapplicable to actions which are based upon the Mining act.²⁷⁵ So, in Michigan, the owner and operator of a mine cannot shield himself from liability for an injury resulting from a violation of a duty imposed upon him by statute, under the defense of assumption of risk or that of negligence of a fellow-servant, because this statute is prohibi-

²⁶⁹ *Illinois Central R. Co. v. Swift*, 213 Ill. 307, 316 (1904); *Kath v. East St. Louis & Suburban Ry. Co.*, 232 Ill. 126, 134 (1908).

²⁷⁰ *Kellyville Coal Co. v. Bruzas*, 223 Ill. 595, 601 (1906).

²⁷¹ *Kistner v. American Steel Foundries*, 233 Ill. 35, 38 (1908).

²⁷² *Chicago Union Traction Co. v. Sawusch*, 218 Ill. 130, 134 (1905).

²⁷³ *McCormick Harvesting Ma-*

chine Co. v. Zakzewski, 220 Ill. 522, 530 (1906).

²⁷⁴ *Campbell v. Chicago, Rock Island & Pacific Ry. Co.*, 243 Ill. 620, 625 (1910); *Kleinfelt v. Somers Coal Co.*, 156 Mich. 473, 478 (1909).

²⁷⁵ *Waschow v. Kelly Coal Co.*, 245 Ill. 516, 521 (1910); *Kellyville Coal Co. v. Strine*, 217 Ill. 516, 527, 528 (1905).

tive in its nature, making a violation of it actionable and is not the mere enactment of the common law rule that only reasonable care and diligence is required to excuse negligence.²⁷⁶ The voluntary continuance in the service amounts to an assumption of risk when the employee has notice of the employer's failure to perform his personal duty, or when the unsafe condition is so apparent as to be obvious to a person of ordinary intelligence.²⁷⁷

But an employee who continues in the service of an employer with knowledge of the latter's violation of a statute which was passed for the employee's protection, does not assume the risk incident to such a violation.²⁷⁸ Any contract with an employee having the effect of relieving the employer of liability for injuries resulting from risks incurred by the violation of duties imposed by law is against public policy and void.²⁷⁹

1656 Minors

The doctrine of assumed risk is inapplicable to employees who from youth or want of natural faculties are unable to appreciate a danger incident to the employment or which may result from the continued use of defective machinery or tools.²⁸⁰

1657 Pleading, general issue

Evidence of assumed risk may be given under the general issue and the question may be raised by an instruction based upon such evidence.²⁸¹

1658 Law and fact

The assumption of risk is a question of fact which is to be submitted under proper instructions,²⁸² where the evidence is conflicting, or where reasonable minds may legitimately draw different conclusions from the undisputed facts established by them.²⁸³

²⁷⁶ *Layzell v. Somers Coal Co.*, 156 Mich. 268, 282 (1909).

²⁷⁷ *Bonato v. Peabody Coal Co.*, 248 Ill. 422, 425 (1911).

²⁷⁸ *Streeter v. Western Wheeled Scraper Co.*, 254 Ill. 248.

²⁷⁹ *Campbell v. Chicago, Rock Island & Pacific Ry. Co.*, *supra*.

²⁸⁰ *Siegel, Cooper & Co. v. Treka*, 213 Ill. 559, 566 (1905).

²⁸¹ *Elgin, Joliet & Eastern Ry. Co. v. Myers*, 226 Ill. 358, 367 (1907); *Layzell v. Somers Coal Co.*, 156 Mich. 270.

²⁸² *Bonato v. Peabody Coal Co.*, 248 Ill. 426.

²⁸³ *Sturm v. Consolidated Coal Co.*, 248 Ill. 20, 27 (1910).

CONTRIBUTORY NEGLIGENCE

1659 Doctrine

A party who last has a clear opportunity to avoid the injury, notwithstanding the negligence of his opponent, is considered solely responsible for it,²⁸⁴ and it is a good defense to an action for personal injuries that the plaintiff was guilty of contributory negligence.²⁸⁵ The injured party cannot be charged with contributory negligence, although his own negligence exposed him to the risk, if the proximate cause of his injury was the result of the defendant's failure to use ordinary care to avoid the injury after becoming aware of the danger sufficiently to put a prudent man on the alert.²⁸⁶ The defense of contributory negligence, except where the negligence is wilful or reckless, has been abolished in Mississippi.²⁸⁷

1660 Rules of employment

It is usually negligence for an employee to violate a known rule of employment, unless the rule is rendered inoperative by its habitual violations with the knowledge and the acquiescence of the employer.²⁸⁸

1661 Minors, brother's negligence

It is no defense to an action by a minor for personal injuries that his brother's negligence contributed to the injury.²⁸⁹

1662 Minors, parent's negligence

The doctrine of contributory negligence has no application to an action for personal injuries brought by a child under the employment age.²⁹⁰ A child under seven years of age cannot be charged with contributory negligence, nor can the parents' negligence be imputed to a child of tender years who is injured by the negligence of another.²⁹¹

²⁸⁴ *Kellyville Coal Co. v. Strine*, 217 Ill. 529.

²⁸⁵ *Mobile & Ohio R. Co. v. Valowe*, 214 Ill. 128.

²⁸⁶ *Star Brewery Co. v. Hauck*, 222 Ill. 348, 350 (1906); *United Rys. & Electric Co. v. Kolken*, 114 Md. 160, 168 (1910); *Strong v. Grand Trunk W. Ry. Co.*, 156 Mich. 66, 75 (1909).

²⁸⁷ *Welsh v. Alabama & Vicksburg Ry. Co.*, 70 Miss. 20, 25 (1892).

²⁸⁸ *Kenny v. Marquette Cement Mfg. Co.*, 243 Ill. 396, 403 (1910).

²⁸⁹ *Perryman v. Chicago City Ry. Co.*, 242 Ill. 269, 274 (1909).

²⁹⁰ *American Car & Foundry Co. v. Armentraut*, 214 Ill. 509, 513 (1905).

²⁹¹ *Richardson v. Nelson*, 221 Ill. 254, 257 (1906); *Illinois Central R. Co. v. Warriner*, 229 Ill. 91, 95 (1907).

1663 Mining act

The defense of contributory negligence is not available in an action under the Mining act.²⁹²

1664 Railroad crossing, negligence

In Michigan, a railroad is regarded as a warning of danger, requiring every person who ventures upon the track to make an effort to ascertain whether a train is approaching, and if either one of the senses of seeing or hearing is defective, the obligation to use the other is stronger; the failure to make such an effort is of itself negligence as a matter of law.²⁹³ In Illinois, a person crossing a railway track, or approaching it with intent to cross it, is required to exercise ordinary care and prudence to avoid injury, and what will constitute ordinary care in any given instance, depends upon the particular circumstances. The mere failure to look and listen is not negligence *per se*, but are circumstances to be considered in determining the question of ordinary care.²⁹⁴

1665 Pleading and practice

The defendant's contributory negligence is provable under the general issue;²⁹⁵ and this defense may be raised by an instruction for a directed verdict.²⁹⁶

1666 Plea (Fla.)

And for a further plea the defendant says that the supposed injury mentioned by the plaintiff in and by his declaration was caused by the plaintiff's own negligence.

(Mississippi)

That the said plaintiff by his own negligence contributed to the said injuries complained of, in this, that (Set forth special circumstances) and in so doing incurred great and unnecessary hazard and received the said injuries complained of. (Pray judgment)

²⁹² *Houglund v. Avery Coal & Mining Co.*, 246 Ill. 609, 616 (1910); *Waschow v. Kelly Coal Co.*, *supra*; *Kellyville Coal Co. v. Strine*, 217 Ill. 516, 523, 527; *Mertens v. Southern Coal & Mining Co.*, 235 Ill. 540, 546 (1908).

²⁹³ *Folkmore v. Michigan United Rys. Co.*, 157 Mich. 159, 166 (1909).

²⁹⁴ *Chicago, Milwaukee & St. Paul*

Ry. Co. v. Wilson, 133 Ill. 55, 60 (1890); *Partlow v. Illinois Central R. Co.*, 150 Ill. 321, 327 (1894), limiting *Illinois Central R. Co. v. Godard*, 72 Ill. 567 (1874) and similar cases.

²⁹⁵ *Winter v. United Rys. & Electric Co.*, 115 Md. 69 (1911).

²⁹⁶ *Mueller v. Phelps*, 252 Ill. 633.

Replication (Miss.)

That, decedent, was not guilty at the time of the injury, etc., of contributory negligence and gross carelessness set up in defendant's special plea; and as to this, the plaintiff puts himself upon the country.

New Assignment (Miss.)

Now came the plaintiffs after leave of court, first had and obtained and say that while still disclaiming any contributory negligence or gross carelessness on the part of, decedent, that they ought not to be barred by the contributory negligence set up in defendant company's special plea, for plaintiff charges that the accident to plaintiff's decedent was caused by the wilful, wanton and grossly negligent conduct of the defendant company's servants in charge of the train that killed plaintiff's decedent who saw plaintiff's decedent's peril after she had gone on the trestle, in ample time to stop, but did not use reasonable care to save her after discovering her peril; and this plaintiffs are ready to verify, etc.

Rejoinder (Miss.)

That it is not true as alleged that the defendant was guilty of the gross negligence amounting to wilfulness or wantonness. (Conclude to the country)

1667 Law and fact

The question of contributory negligence is for the jury, when reasonable men might reach different conclusions, or different inferences could reasonably be drawn from the admitted or established facts; but the question is one of law, when the undisputed evidence clearly and conclusively shows that the accident resulted from the negligence of the party who was injured and could have been avoided by the use of reasonable precaution.²⁹⁷

FELLOW-SERVANT

1668 Doctrine

An employer is not liable for injuries sustained by an employee resulting from the negligence of another employee, where, at the time of the injury, both employees were directly co-operating with each other in a particular business in the same line of

²⁹⁷ *Mueller v. Phelps*, 252 Ill. 634;
Sturm v. Consolidated Coal Co., 248
 Ill. 20.

employment, or their duties were such as to bring them into habitual association so that they could have exercised a mutual influence upon each other promotive of proper caution, and the employer was not guilty of negligence in employing the employee who caused the injury.²⁹⁸ The requirement that a fellow-servant must be in the employment of a common employer is inapplicable to a case where one employer temporarily loans to another employer an employee for some special service, the employee for the time becoming wholly subject to the direction and control of the second employer and with whose employees the employee thus loaned may bear a relation of a fellow-servant.²⁹⁹ Aside from this the defense of fellow-servant has no application to persons who are not in the employ of the same employer.³⁰⁰ An employee does not assume such negligence of a fellow-servant as is not the proximate cause of the injury.³⁰¹

The rule of fellow-servant has been abolished in Mississippi as to employees of railroad companies and all other corporations and individuals using engines, locomotives or cars propelled by steam, electricity, gas, gasoline or lever power, and running on tracks.³⁰²

By Virginia constitution, the rule of fellow-servant has been abolished as to all agents of a railroad company, whose duty it is to transmit telegraphic or telephonic orders for the movement of trains to their conductors, regardless of the instrumentalities that are employed to accomplish that purpose.³⁰³

1669 Strangers

A stranger cannot invoke the defense of contributory negligence of a fellow-servant against an injured party who is without fault and who has no authority over such servant.³⁰⁴

²⁹⁸ *Illinois Steel Co. v. Ziemkowski*, 220 Ill. 324, 329 (1906); *Bennett v. Chicago City Ry. Co.*, 243 Ill. 420, 428, 430 (1910); *Lyons v. Ryerson & Son*, 242 Ill. 409, 413 (1909); *Aldrich v. Illinois Central R. Co.*, 241 Ill. 402, 405 (1909); *Crane Co. v. Hogan*, 228 Ill. 338, 345 (1907); *Indiana, Illinois & Iowa R. Co. v. Otstot*, 212 Ill. 429, 435 (1904); *Linquist v. Hodges*, 248 Ill. 491, 503 (1911).

²⁹⁹ *Pittsburg, Cincinnati, Chicago & St. Louis Ry. Co. v. Bovard*, 223 Ill. 176, 182 (1906).

³⁰⁰ *Chicago & Alton R. Co. v. Harrington*, 192 Ill. 9, 29 (1901).

³⁰¹ *Shickle-Harrison & Howard Iron Co. v. Beck*, 212 Ill. 268, 272 (1904).

³⁰² Sec. 4056, Code 1906 as amended (Laws 1908, p. 204).

³⁰³ *Virginia & Southwestern Ry. Co. v. Clower*, 102 Va. 867, 874 (1904); Sec. 162, Const. (Va.); Sec. 1294k, Va. Code Ann. 1904.

³⁰⁴ *Nonn v. Chicago City Ry. Co.*, 232 Ill. 378 (1908).

1670 Concurrent negligence

This defense is likewise inapplicable to an injury which is the result of the employer's negligence combining with that of a fellow-servant and the injury would not have happened but for the employer's negligence.³⁰⁵

1671 Vice-principal

An employer is not absolved from liability for the negligent performance of his personal duties by delegating them to a servant of whatever grade, rank, or authority; and as to these duties, the rule of fellow-servant does not apply.³⁰⁶ Among the non-delegated personal duties of the employer are the duty to warn the employee of latent defects and dangers which are, or ought to be known, to the employer and of which the employee, without his fault is ignorant, and the duty to exercise reasonable diligence to furnish the employee a reasonably safe place in which to perform his work.³⁰⁷ An employee who is given by his employer authority to control and direct the movements of men under his charge in a particular branch of his employer's business, stands in the place of the employer while in the exercise of this authority, and is not a fellow-servant of such men, although at other times the relation of fellow-servant may exist between them.³⁰⁸ An employer is not liable for an injury received by an employee through the negligence of the vice-principal who was acting as a co-laborer with the injured employee and when the injury is not the result of the exercise of the vice-principal's authority; but an employer is liable where the injury results from the negligence of the vice-principal as such in combination with his negligence as a fellow-servant and the negligence of the employer or vice-principal is such that the injury would not have happened but for his negligence.³⁰⁹ The negligence of a foreman is that of a fellow-servant, if at the time of the injury he was not in the performance of his duties as foreman.³¹⁰

³⁰⁵ Siegel, *Cooper & Co. v. Treka*, 218 Ill. 567; *St. Louis National Stock Yards v. Godfrey*, 198 Ill. 288, 293 (1902); *Schillinger Bros. Co. v. Smith*, 225 Ill. 74, 79 (1907); *Kennedy v. Swift & Co.*, 234 Ill. 606, 610 (1908).

³⁰⁶ *Donk Bros. Coal & Coke Co. v. Thil*, 228 Ill. 233, 235 (1907); *Rogers v. Cleveland, Cincinnati, Chicago & St. Louis Ry. Co.*, 211 Ill. 126, 132 (1904).

³⁰⁷ *Donk Bros. Coal & Coke Co. v. Thil*, *supra*.

³⁰⁸ *Chicago Terminal Transfer R. Co. v. Reddick*, 230 Ill. 105, 107 (1907); *East St. Louis Connecting Ry. Co. v. Meeker*, 229 Ill. 98, 108 (1907).

³⁰⁹ *Roebling Construction Co. v. Thompson*, 229 Ill. 42 (1907).

³¹⁰ *Baier v. Selke*, 211 Ill. 512, 516 (1904).

1672 Miners

The defense of fellow-servant is inapplicable to miners whose employment is forbidden by law.³¹¹

1673 Law and fact

The existence or non-existence of the relation of fellow-servant is a mixed question of law and fact depending upon the court for a definition of the relation and upon the jury for an application of the facts to such definition, unless the facts are undisputed, or the evidence and all the legitimate inferences to be drawn therefrom are such that all reasonable men would draw but one conclusion, when the question becomes one of law.³¹²

MINE INJURIES**1674 Class legislation**

Special legislative protection to miners is expressly authorized by the constitution.³¹³

1675 Dangerous places

The conspicuous mark must be put in the working place of the mine where the physical dangerous conditions exist, and a report made thereof; and as thus limited, the statute imposing these duties is valid.³¹⁴

1676 Wilful violation of statute

In an action under the Mining act it is no defense that the negligence complained of was not the result of a wilful violation of the statute.³¹⁵

1677 Ordinary care, law and fact

In Illinois the only legal requirement with reference to a person who is injured is that his conduct, at the time of the injury,

³¹¹ *Syneszewski v. Schmidt*, 153 Mich. 438, 442 (1908); *Dalm v. Bryant Paper Co.*, 157 Mich. 550, 554 (1909).

³¹² *Linquist v. Hodges*, 248 Ill. 504; *Aldrich v. Illinois Central R. Co.*, 241 Ill. 402, 406 (1909); *Lyons v. Ryerson & Son*, 242 Ill. 409, 414 (1909); *Bennett v. Chicago City Ry. Co.*, 243 Ill. 420, 428, 423 (1910).

³¹³ *Rogers v. St. Louis-Carterville Coal Co.*, 254 Ill. 104, 110 (1912); Sec. 29, art. 4, Constitution 1870 (Ill.).

³¹⁴ *Cook v. Big Muddy-Carterville Mining Co.*, 249 Ill. 41, 47, 48 (1911).

³¹⁵ *Eldorado Coal & Coke Co. v. Swan*, 227 Ill. 586, 592 (1907).

should be consistent with what a man of ordinary prudence would do under like circumstances; and whether or not he has exercised this care is always a question of fact to be determined by the circumstances attending the event. There is no rule of law which prescribes any particular act to be done or omitted by a person who finds himself in a place of danger.³¹⁶

RELEASE AND SETTLEMENT

1678 Covenant not to sue and release, distinction

A covenant not to sue any one of two or more tort feorsors is no bar to an action against the other tort feorsors.³¹⁷ But a release to one of several joint tort feorsors, is a release to all;³¹⁸ and an accord and satisfaction with one of them is a bar to an action against the others.³¹⁹

1679 Employer's liability, release, fraud

Liability for injuries resulting from an employer's negligence cannot be released in advance of injury, as it is against public policy to enter into such a release.³²⁰ But the voluntary acceptance by an employee of all, not merely a portion, of the benefits provided for in an agreement between himself and the relief department of a corporation, with the full knowledge that such contract provided that the acceptance of benefits under the same should operate as a satisfaction of all claims against the employer on account of injuries received is a bar to a subsequent suit for such injury.³²¹ A release may be impeached for fraud in an action at law where the fraud inheres in the execution of the instrument, as by some trick or device a party is made to sign an instrument which he did not intend to execute.³²² In an action for personal injuries, a release of claim for damages may be shown to have been obtained by fraud and circumvention without returning the consideration or annulling the instru-

³¹⁶ *Stack v. East St. Louis & S. Ry. Co.*, 245 Ill. 308, 310 (1910).

³¹⁷ *Chicago & Alton Ry. Co. v. Averill*, 224 Ill. 516, 522 (1906).

³¹⁸ *Wallner v. Chicago Consolidated Traction Co.*, 245 Ill. 148, 151 (1910).

³¹⁹ *Chicago v. Babcock*, 143 Ill. 358, 366 (1892).

³²⁰ *Campbell v. Chicago, Rock*

Island & Pacific Ry. Co., 243 Ill. 620, 625 (1910).

³²¹ *Eckman v. Chicago, Burlington & Quincy R. Co.*, 169 Ill. 312, 321 (1897); *Pennsylvania Co. v. Chapman*, 220 Ill. 428, 433 (1906); *Spitze v. Baltimore & Ohio R. Co.*, 75 Md. 162, 168 (1892).

³²² *Chicago City Ry. Co. v. Uhter*, 212 Ill. 174, 176 (1904).

ment by decree.³²³ A release of damages for personal injuries, which has not been set aside in a court of chancery, is a bar to an action at law for the same injuries, where the releasor was mentally capable of knowing and understanding what he was signing at the time he executed the release. Such a release is not a bar to the action, where he was mentally incompetent of knowing what he was doing, or where he was deceived or tricked into signing the release.³²⁴

1680 Law and fact

The release of damages for personal injuries is a question of fact when there is any evidence which tends to show lack of mental capacity in the plaintiff to understand what he was doing; the question of release is for the court when it clearly appears that the releasor did understand what he was signing and that it was a settlement of his claim.³²⁵

1681 Plea (Ill.)

And that after the happening of the said supposed grievances in the said declaration mentioned and before the commencement of this suit, to wit, on the day of, 19.., at, to wit, the county of, and state of Illinois, the plaintiff by his deed bearing date of that day, and now to the court here shown, released to the defendant all claims or demands which he, the said plaintiff, then had or might thereafter have against the defendant on account of the occurrence of the said supposed grievances, as by the said deed, reference being had thereto, will more fully appear; and this the defendant is ready, etc.

Release in haec verba

And that subsequent to the happening of the said supposed grievances above laid to its charge, and prior to the commencement of this suit the defendant, on, to wit, the day of, 19.., at, to wit, the county of, aforesaid, for the consideration therein mentioned, to him then paid by the defendant, signed, executed and delivered his certain release of all of said supposed causes of action in said declaration mentioned, in the words and figures following: (Insert release *in haec verba*). And this, etc.

³²³ Spring Valley Coal Co. v. Buzis, 213 Ill. 341, 346 (1904).

³²⁴ Turner v. Manufacturer's & Consumer's Coal Co., 254 Ill. 187, 193 (1912).

³²⁵ Turner v. Manufacturer's & Consumer's Coal Co., 254 Ill. 194.

1682 Replication (Ill.)

That when, etc., at the time of the execution and delivery of the said release alleged in said plea by the said plaintiff to the said defendant, as alleged in said plea, that the said plaintiff did not have sufficient mind and memory and mental capacity to know and understand the nature, effect and purport of the said paper, described in said plea as a deed and release; that the said plaintiff at said time did not have sufficient mind and memory and mental capacity to know, understand or appreciate the effect of said instrument, or of the ordinary affairs and transactions of life; and that plaintiff was then and there blind and unable to see and did not know the nature, effect and purport of said instrument; and being then and there in said state of mind and mental condition was fraudulently induced and persuaded to sign the said instrument by the agents and representatives of the said defendant corporation and those acting in concert with them, not knowing that said instrument was a release of the cause of action set forth in his declaration; and that at said time the defendant corporation and its said agents and representatives and those acting in concert with them then and there knew that said plaintiff did not have sufficient mental capacity to know, understand and appreciate the nature and effect of the said instrument, or of his acts, on account of the injuries sustained by the said plaintiff and complained of by him in his said declaration, and defendant did then and there fraudulently procure and obtain the release from the plaintiff for the fraudulent and unlawful purpose of securing an unjust advantage of the plaintiff; and this the defendant is ready, etc.

1683 Rejoinder

That at the time of the execution and delivery of the said release above mentioned the plaintiff did have sufficient mind and memory and mental capacity to know and understand the nature, effect and purport of the same and to appreciate the effect of the said instrument and of the ordinary affairs and transactions of life, and that the plaintiff did then know the nature, effect and purport of the said instrument and was not, while mentally incapacitated, fraudulently induced and persuaded to sign the said instrument by the agents and representatives of this defendant, not knowing said instrument was a release of the cause of action set out in the declaration; and that this defendant did not then fraudulently procure and obtain said release from the plaintiff for the fraudulent and unlawful purpose of securing an unjust advantage of the plaintiff. (Conclude to the county)

1684 Res ipsa loquitur

The rule that the accident or injury sustained by the plaintiff bespeaks the defendant's wrong (*res ipsa loquitur*) has no application to a personal injury which is the result of a pure accident to a person to whom the defendant owes no absolute duty except that of exercising due care to avoid injury generally.³²⁶ The rule or maxim of *res ipsa loquitur* pertains to evidence, and not to pleading;³²⁷ and applies only where a machine, appliance, or thing from which the injury results is shown to be under the management of the defendant and the accident is such as in the ordinary course of things does not happen if those in control use proper care.³²⁸ It is applicable to certain railway accidents, but not to the relation of employer and employee.³²⁹

1685 Sidewalk accident

In an action against a municipality for personal injuries sustained upon a sidewalk, the defense that the declaration does not count upon the statute cannot be raised under the general issue.³³⁰

1686 Statute of limitations, pleas (District of Columbia)

That the action for damages alleged and set forth in said declaration was not brought within one year after the death of the party injured, to wit, plaintiff's intestate as required by section 1302 of the Code of the District of Columbia.

b

That said amended declaration sets forth a new cause of action differing from that set forth and alleged in the original declaration and which cause of action accrued, on, to wit, the day of, when the plaintiff's intestate, said died and no action was brought therefor, until the day of, the date of the filing of said amended declaration, which was more than one year after said death, contrary to the statute in such case made and provided.

³²⁶ Chicago & Eastern Illinois R. Co. v. Reilly, 212 Ill. 506 (1904).

³²⁷ Chicago Union Traction Co. v. Giese, 229 Ill. 260, 263 (1907).

³²⁸ Illinois Central R. Co. v. Swift, 213 Ill. 307, 316 (1904).

³²⁹ Green v. Sansom, 41 Fla. 94,

104 (1899); c. 4071, Acts 1891 (Fla.).

³³⁰ Fuller v. Jackson (City), 82 Mich. 480, 482 (1890); Clark v. North Muskegon, 88 Mich. 308, 310 (1891).

(Illinois)

That the said several supposed causes of action in said additional counts mentioned did not, nor did any or either of them, accrue to the plaintiff at any time within one year next before the filing of the said additional counts, in manner and form as the plaintiff has above thereof in said additional counts and each of them complained against it, and because the original declaration filed herein and each count thereof wholly failed to and did not state a cause of action against this defendant. And this the defendant is ready to verify; wherefore this defendant prays judgment if the plaintiff ought to have his aforesaid action against this defendant.

1687 Statute or ordinance, violation

To bar a recovery on the ground of the violation of an ordinance, it must appear that such violation was the proximate and efficient cause of the injury.³³¹

GENERAL ISSUE

1688 Notice of claim

The defense that no notice of claim for personal injuries was served upon a municipality prior to the bringing of an action against it, may be urged under the general issue.³³² A municipality does not waive its right to insist upon the giving to it of notice of claim required by statute as a condition precedent to the bringing of an action upon it, by attempting to arbitrate or to adjust the claim before the bringing of the action.³³³ But such a defense, being in the nature of a personal privilege, like a right to insist upon the statute of limitations, is waived if it is not interposed before verdict and judgment.³³⁴

1689 Ownership and control

A plea of not guilty to a declaration for personal injuries alleging the ownership of a railroad and its operation by the defendant, admits the corporate existence of the defendant, the operation of the particular line of railroad mentioned in the declaration and the operation of the train causing the injury by

³³¹ *Star Brewery Co. v. Hauck*, 222 Ill. 352.

³³² *Clark v. Davison (Village)*, 118 Mich. 420, 424 (1898).

³³³ *Clark v. Davison (Village)*, *supra*.

³³⁴ *Canfield v. Jackson (City)*, 112 Mich. 120 (1897); *Clark v. Davison (Village)*, 118 Mich. 423.

its employees;³³⁵ but it does not put in issue the ownership and operation of the particular car which caused the injury.³³⁶ A plaintiff, however, is not required, under the general issue to prove the defendant's ownership of the property or the instrumentalities which caused the injury, such ownership being matter of inducement.³³⁷ In personal injury cases the defendant must plead specially that he is not the owner, or in possession or operation of the property or instrumentalities which caused the injury.³³⁸

1690 Release and settlement

In an action for personal injuries a settlement with and a release from a former administrator of the claim sued upon is admissible in evidence under the general issue.³³⁹

1691 Survivorship

A plaintiff is bound to prove under the general issue the fact of survivorship of a widow or next of kin and who they are.³⁴⁰

GROUND OF DEFENSE

1692 Form (Va.)

1. The defendant denies all allegations of negligence in the declaration and each count thereof.

2. The defendant denies that it was negligent in failing to apply suitable appliances and instrumentalities; and on the contrary says that the same were in safe and proper condition.

3. The defendant denies that it failed to perform any legal duty as to inspecting or keeping in safe condition and repair its appliances and instrumentalities.

4. The plaintiff assumed the risk.

5. The plaintiff was guilty of negligence on his own behalf which caused, or contributed, to his injury.

³³⁵ *Chicago & Eastern Illinois R. Co. v. Schmitz*, 211 Ill. 446, 459 (1904); *Pell v. Joliet, Plainfield v. Aurora R. Co.*, 238 Ill. 510, 514 (1909); *Chicago Union Traction Co. v. Jerka*, 227 Ill. 95, 99 (1907); *Winn v. Cleveland, Cincinnati, Chicago & St. Louis Ry. Co.*, 239 Ill. 132, 142, 143 (1909); *McNulta v. Lockridge*, 137 Ill. 270 (1891); *Pennsylvania Co. v. Chapman*, 220 Ill. 431.

³³⁶ *Brunbild v. Chicago Union Traction Co.*, 239 Ill. 621, 624 (1909).

³³⁷ *Chicago Union Traction Co. v. Jerka*, 227 Ill. 100.

³³⁸ *Chicago Union Traction Co. v. Jerka*, *supra*.

³³⁹ *Balsewicz v. Chicago, Burlington & Quincy R. Co.*, 240 Ill. 238, 247 (1909).

³⁴⁰ *Quincy Coal Co. v. Hood*, 77 Ill. 68, 73 (1875).

MISCELLANEOUS

1693 Assignment of right of action (Miss.)

In consideration of legal services rendered and to be rendered, I,, assign, set over and convey unto, my attorneys, an undivided interest in and to my right of action against the, for injuries inflicted upon the property by burning, which right of action is set forth in the above styled cause in this court.

Witness, etc.

(Venue)

Personally appeared before the undersigned officer,, in and for said county and state, the above named, who acknowledged that he signed and delivered the foregoing assignment on the day and date thereof.

Witness, etc.

1694 Assignment and retainer (Miss.)

This is to certify that I,, have this day employed, of the firm of, attorneys and counsellors at law, of, my true and lawful attorneys to prosecute the cause of action I have against the, for injuries sustained by me on the day of, 19.., in the city of and state aforesaid, with the full power to settle said claim, by compromise or otherwise, whether I am present or not, and do all lawful acts that are to be done in the premises. And be it known that, in consideration of the services performed and to be performed, I do hereby sign, transfer, set over, and deliver to said, per cent, or of all my right, interest and title I have in said claim.

Witness, etc.

(Venue)

This day personally appeared before me the undersigned authority in and for said county and state,, who acknowledged that he signed and delivered the foregoing instrument, on the day and year therein mentioned.

Given, etc.

1695 Attorneys' fees, motion (Ill.)

And now comes plaintiff by, his attorneys, and moves the court to tax reasonable attorneys' fees as cost of suit.

By.....
his attorneys.

1696 Attorneys' fees, judgment (Ill.)

This day again come the parties to this suit by their attorneys respectively and the plaintiff asks for a final judgment upon the verdict herein and for plaintiffs' attorneys' fees. Therefore it is considered by the court that the plaintiff do have and recover of and from the defendant his said damages of dollars in form as aforesaid by the jury assessed together with his costs and charges in his behalf expended; and it is further considered by the court that the plaintiff recover the sum of dollars as his attorneys' fees to be taxed as costs.

ATTORNEY'S LIEN**1697 Nature and scope**

The Illinois statute creates a lien upon the cause of action in favor of the attorney, requiring the defendant, after due notice of the lien, in making settlement with the party as to such cause of action, to take into account his liability to the attorney for whatever amount of fees would accrue under his contract at the time of the settlement; and if such lien is ignored, the defendant will be required to account to the attorney in an appropriate proceeding for the amount of the lien.³⁴¹ The statute which creates an attorney's lien is not class legislation, does not interfere with the right of contract, and is valid.³⁴² Under the statute, the lien of an attorney attaches from and after the service of notice and protects the attorney against any settlement that might thereafter be made, regardless of whether the suit had been commenced, was pending or had been finally determined by the rendition of a judgment.³⁴³

1698 Notice (Ill.)

To

Having been employed as attorney at law by each of, of county, Illinois, to prosecute their joint and several claims against you for personal injuries sustained by them, by one of your cars striking an automobile in which they were riding at street and avenue, in county and state of Illinois, at o'clock, on, 19.., this is to notify you that I have and claim a lien for an attorney's fee

³⁴¹ Standidge v. Chicago Rys. Co., 254 Ill. 524, 535 (1912); 1909 Laws, p. 97.

³⁴² Standidge v. Chicago Rys. Co., 254 Ill. 533, 534.

³⁴³ Standidge v. Chicago Rys. Co., *supra*.

for services rendered and to be rendered in regard to each of said claimants, the fee in each of said claim being for of whatever money, if any, should be paid by reason of, or in, their settlement.

Dated, etc.

.....
Attorney for each of said claimants.

(Add proof of service)

1699 Petition, filing

The constitutional uniformity of procedure is not substantially affected by the filing of a petition for an attorney's lien in a cause from which the lien has arisen.³⁴⁴

1700 Petition (Ill.)

(Caption in personal injury case)

To the honorable, judge of said court:

Your petitioner,, respectfully represents unto your honor that he is attorney for the plaintiff in the above entitled cause, and as such attorney brought, filed and prosecuted said cause for and on behalf of said plaintiff, under an agreement made prior to the time of the bringing and filing of said cause, between your petitioner and said plaintiff, that your petitioner should bring, file and prosecute said cause for the collection of damages for injuries to said plaintiff at the time and place and in the manner described in the declaration of the plaintiff filed heretofore herein, and that for so doing your petitioner should receive of whatever amount, if any, should be paid by the defendants in settlement of the claim of said plaintiff for damages as aforesaid, namely, an amount equal to of the amount, if any, to be received by the plaintiff in settlement of such claim; that about one year after the filing of said cause in said court, the defendants, through their successor the, paid to the plaintiff, as your petitioner is informed and believes, dollars in settlement of said claim; that long prior to the time when said defendants, through their said successor, paid to the plaintiff, said sum in settlement of said claim as aforesaid, your petitioner served upon said defendants notices in writing claiming an attorney's lien for his services rendered and to be rendered herein for of whatever money, if any, should be paid to the plaintiff in settlement of said claim, namely, an amount equal to of the amount to be received by the plaintiff in settlement thereof, and stating in such notices that your petitioner had an interest in said claim of the plaintiff for the amount and to the extent of such lien,

³⁴⁴ Standidge v. Chicago Rys. Co.,
254 Ill. 533.

under and as provided in "An Act creating attorney's lien and for enforcement of same," which Act at the time of the filing of said cause was, ever since has been, and still is, in force as law in the state of Illinois; that after the service of said notices upon said defendants and before the time of the payment by said defendants, through their said successor, of said sum of money in settlement of his said claim for damages as aforesaid, said defendants were duly discharged as receivers of the said by order of the court by which they were appointed to act as such, and the said thereupon became their successor, and ever since has continued to be, and is now, such successor.

Your petitioner further represents that said defendants and their said successor, the have refused, and still refuse to pay to your petitioner the amount due to him under said lien, and he has not received from anyone any part of the amount so due to him under said lien; and he therefore prays this honorable court to adjudicate the rights of the parties hereto and enforce your petitioner's said lien as provided in said "Act creating attorney's lien and for enforcement of same."

.....
Petitioner.

(Verification)

1701 Order

This cause coming on to be heard upon the intervening petition of, and the answer of the defendants and their successor the, to said petition heretofore filed herein, and it appearing to the court that five days' notice has been given by said intervening petitioner to said defendants and their said successor of such hearing on said petition, and the court having heard the evidence introduced by said intervening petitioner and said defendants and their said successor and being fully advised in the premises, doth find that the allegations of said petition, and each thereof are true, and that by reason thereof there is due from said defendants and their said successor to said intervening petitioner the sum of dollars.

Now, therefore, the court orders, adjudges and directs that said defendants and their successor the, pay to said, intervening petitioner, instanter, said sum of dollars, and that upon their failure to do so, the clerk of said court shall issue execution forthwith in favor of said intervening petitioner and against said, successor of said defendants,, receivers of the therefor and for the collection thereof.

CHAPTER XXIV

COVENANT

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IN GENERAL

1702 Instruments, nature

The action of covenant may be based upon a deed under seal executed by a person, or in his behalf;¹ or the action may be maintained upon an instrument which is not in fact sealed, but which was intended to operate as a deed. At common law it was not necessary to the maintenance of the action that there should be an actual seal to the instrument sued upon.² Thus, contracts executed on the same day, by the same parties, concerning the same subject matter, and made to depend upon each other, constitute one agreement and will support an action of covenant if one of them is under seal.³

It is permissible in Michigan to declare in assumpsit wherever the action of covenant would be appropriate; but upon making the election, the plaintiff's rights will be governed by the form and not by the nature of his cause of action.⁴

¹ Rockford, Rock Island & St. Louis R. Co. v. Beckemeier, 72 Ill. 267 (1874); Haynes v. Lucas, 50 Ill. 436, 438 (1869).

² Jerome v. Rothschild, 66 Mich. 668 (1887).

³ Horner's Adm'r v. Ebersole, 83 Va. 765, 767 (1887).

⁴ Christy v. Farlin, 49 Mich. 319 (1882); (10,417), C. L. 1897 (Mich.).

1703 Trust deed

A trust deed which does not contain an express covenant or promise to pay a debt, being a mere security, cannot be made the basis for an action of covenant.⁵

PARTIES

1704 Assignees

On covenant running with the land, as a warranty of title, an assignee may sue for a breach of the warranty in his own name. But on covenants *in presenti*, as covenant of seizin and power to sell, and assignee must sue in the name of the covenantee.⁶

SPECIAL CAUSES AND DECLARATIONS

1705 Covenant of title, action

A covenant of warranty of title is prospective and is broken upon eviction or its equivalent. The covenant of seizin or of power to sell is a covenant *in presenti*, and is broken as soon as made if the grantor has no title at the time he enters into it.⁷

1706 Covenant of title, declaration requisites

A declaration which is based upon a breach of warranty of title must aver specifically the manner and the quality of complete eviction, or the acts which constitute its equivalent.⁸ In an action of covenant by an assignee upon a general warranty of title it is not necessary to aver in the declaration that the plaintiff's guarantor also warranted the title to the assignee, nor that such guarantor has performed his covenants with the defendant.⁹

1707 Covenant of seizin, declaration requisites

In an action for a breach of covenant of seizin a general assignment of the breach is insufficient to sustain the action, unless the title is specially put in issue by the defendant's pleading. The declaration should specifically point out defects, if any, in the title.¹⁰

⁵ Wolf v. Violet's Adm'r, 78 Va. 57, 60 (1883).

⁶ Brady v. Spurek, 27 Ill. 478, 481 (1861).

⁷ Brady v. Spurek, *supra*.

⁸ Brady v. Spurek, 27 Ill. 482.

⁹ Brady v. Spurek, 27 Ill. 481.

¹⁰ Ingalls v. Eaton, 25 Mich. 32 (1872).

1708 Insurance, fire, action

At common law the proper form of action upon a fire insurance policy is covenant, if the policy is under seal and is in existence. In Illinois, the action upon an insurance policy may be *assumpsit*.¹¹

1709 Promissory note, Narr. (Va.)

¹² For this, to wit, that heretofore, to wit, on the day of, during the life time of said, at, the said defendant, by her certain writing obligatory, sealed with her seal, and now to the court here shown, the date whereof is the day and year aforesaid, acknowledged herself to be held and firmly bound unto the said, for value received, in the sum of dollars, with interest at per cent from until paid, to be paid to the said on demand which she, the said, covenanted thereby to do. Said bond is in the words and figures following (Insert note or bond) and upon the back of said bond are the following credits (Insert credits).

And the said plaintiff in fact saith that although the said plaintiff, executor as aforesaid, since the death of the said, and the said, during his life time, have always, from the time of making said writing obligatory until hitherto, well and truly performed and fulfilled and kept all things therein contained on the part of said to be done and kept according to the tenor and effect, true intent and meaning of the said writing obligatory, and of which, the plaintiff, executor as aforesaid since the death of the said, and the said during his life time often, since the making of the said writing obligatory, demanded of the said the payment of the aforesaid sum of money and interest as aforesaid; yet, that the said defendant since the making of the said writing obligatory hath not performed, fulfilled and kept the said covenant and promise in the said writing obligatory contained on her part to be fulfilled, and kept according to the tenor and effect, true intent and meaning of the said writing obligatory, especially in this, that the said defendant hath not paid to the plaintiff, executor as aforesaid, since the death of the said, nor to the said during his life time, the said sum of dollars and interest and per cent thereon from, as aforesaid, nor any part thereof except dollars, to wit,, said payments being applied first on account of interest afore-

¹¹ *Rockford Ins. Co. v. Nelson*, 65 Ill. 415, 424 (1872); Sec. 33, Practice act 1907 (Ill.).

¹² See Section 211, Note 60.

said, due on the days of the said payments respectively, and then on account of the principal of said sum of money covenanted to be paid as aforesaid; but the same to pay hath hitherto wholly failed and refused, to the plaintiff since the death of said and to the said during his life time,, and still doth fail and refuse contrary to the form and effect of the said writing obligatory and of the said covenant of the said defendant so by her made in that behalf as aforesaid.

By reason of all which said premises, the said plaintiff since the death of said and the said during his life time have not only been deprived of said sum of money, with interest thereon, as aforesaid, and divers other sums of money, amounting in the whole to a large sum, to wit, the sum of dollars, but have also been obliged to pay certain costs, expenses and charges, amounting to a large sum of money, to wit, the sum of dollars, in and about endeavoring to collect the said sum of money and interest as aforesaid.

SPECIAL DEFENSES, PLEAS, ETC.

1710 Pleading

Each distinct breach of covenant is a separate cause of action to which a defendant may plead specially.¹³

1711 Covenant performed, plea, nature

A plea of covenant performed traverses all of the covenants except the execution of the instrument and the performance of covenants by the plaintiff.¹⁴

GENERAL ISSUE

1712 At common law

In covenant there is no general issue at common law. Neither a plea of *non est factum*, nor does a plea of covenants performed amount to a plea of the general issue.¹⁵ Under Michigan practice the general issue to a declaration which merely assigns a breach of covenant of seizin does not put in issue the defendant's title.¹⁶

VERDICT AND JUDGMENT

1713 Generally

The form of verdicts and judgments in this form of action are similar to verdicts and judgments in actions of assumpsit.

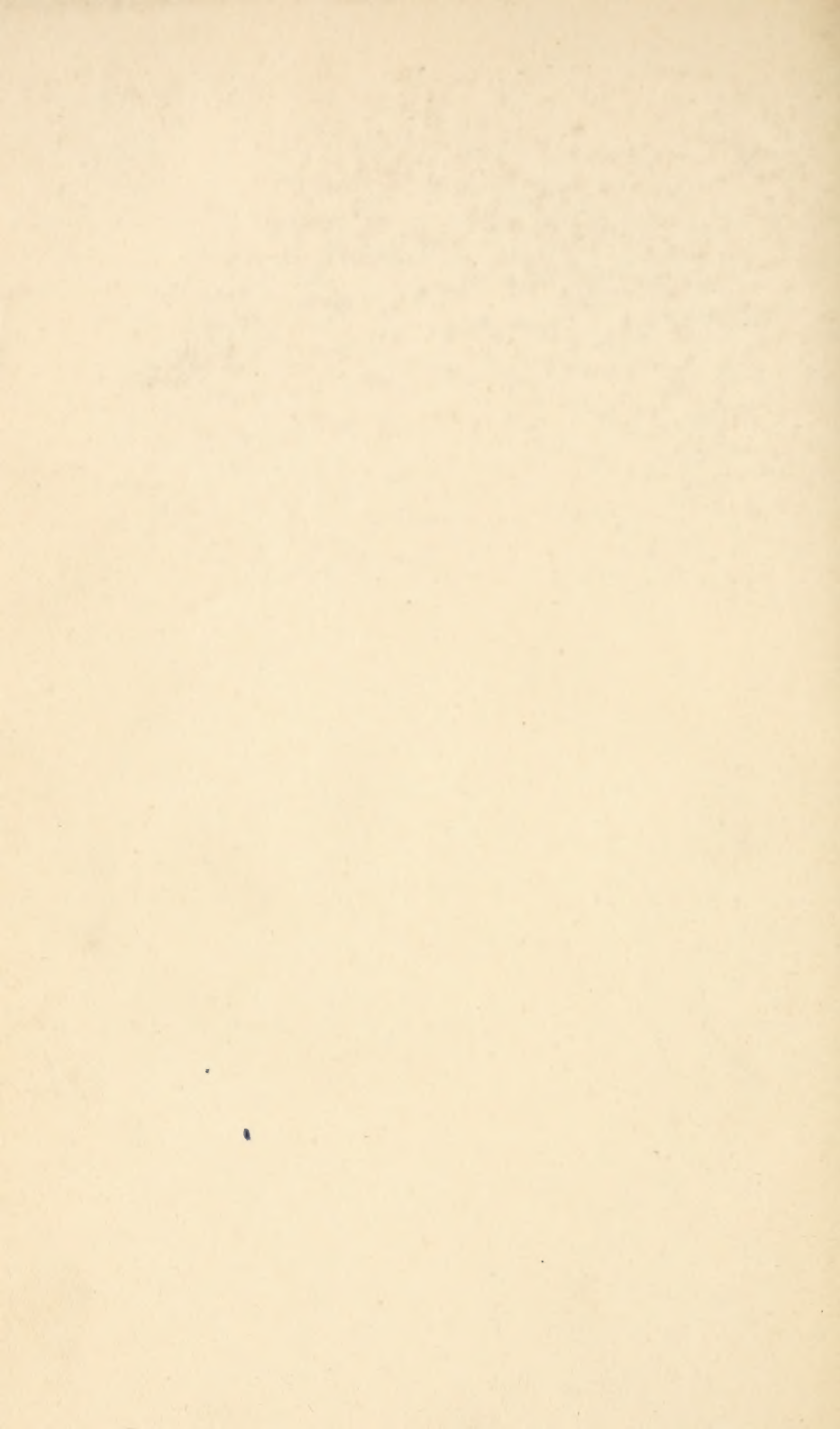
¹³ Brady v. Spurek, 27 Ill. 482.

¹⁴ Reeves v. Forman, 26 Ill. 313,

319 (1861).

¹⁵ Reeves v. Forman, *supra*.

¹⁶ Ingalls v. Eaton, *supra*.



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